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GOVERNMENTAL RESPONSIBILITY FOR DISASTER WARNINGS

H. Alva Brumfield

APPRAISAL PROVISIONS OF THE STANDARD FIRE POLICY

Thomas H. Watkins

DOMICILE OF SERVICEMEN

Lee Davis Thames

March 1963

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GOVERNMENTAL RESPONSIBILITY FOR DISASTER WARNINGS

H. Alva Brumfield

I. Introduction

With the increase in functions and responsibilities assumed by the federal government has come a greater participation in all phases of the occurrence of a disaster, including the furnishing of warnings of its impending arrival, aid in the evacuation of those affected, and assistance after the catastrophe has struck. As a consequence, damages resulting from natural disasters such as earthquakes, floods, hurricanes, and the like, or those which are man-made, have formed the basis of litigation seeking to hold the United States liable under the Federal Tort Claims Act for its negligent performances of its activities in connection with these disasters.

The Federal Tort Claims Act provides that negligent acts or omissions on the part of a government employee, acting within the scope of his employment, shall give rise to a cause of action against the United States ". . . if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[1] In consenting to be sued, the United States has excepted certain types of acts and omissions which may briefly be described as being the performance of, or failure to perform a discretionary function,[2] and acts or omissions characterized as misrepresentations.[3] The scope of these exceptions, as delineated by the courts, is most important to a consideration of the success or failure of a claim against the government arising out of a disaster.

II. The Defense of Discretionary Function

Designation of an act of function as discretionary,[4] fatal to a

*Brumfield, Turner and Cooper, Baton Rouge, Louisiana.

[1] 28 U.S.C. § 1346 (b) (1948); see 28 U.S.C. §§ 2674-80 (1948).

[2] 28 U.S.C. § 2680 (a) (1948).

[3] 28 U.S.C. § 2680 (h) (1948).

[4] See generally Jones, *Recent Developments of the Federal Tort Claims Act*, 12 Baylor L. Rev. 184 (1960); Peck, *The Federal Tort Claims Act: A Proposed Construction of the Discretionary Function*, 31 Wash. L. Rev. (1956); Vaughan, *The "Discretionary Function" Exception of the Federal Tort Claims Act; Some Reflections on Sovereign Immunity*, 1 William & Mary L. Rev. 5 (1957); note, 66 Harv. L. Rev.

claimant's cause of action, has proved to be a troublesome task for the courts, as indicated by the United States Court of Appeals' observation that the law on this point is "fluid" and "relatively uncertain."[5] The United States Supreme Court, in *Dalehite v. United States*, held that the "discretionary function" embraced not only initiation of programs and activities, but the decisions of executives or administrators responsible for formulating plans, specifications, or schedules of operations.[6] Whenever a policy judgment and decision were involved, discretion was present; hence, subordinates adhering to official directions in carrying out governmental operations could not incur liability on the part of the United States.

Two years later, in *Indian Towing Co. v. United States*, the Supreme Court had occasion to interpret the scope of the discretionary function exception, drawing a distinction between discretionary acts, from which no responsibility could be incurred, and operational acts, whose negligent performance stated a cause of action against the United States.[7] The plaintiff sued for damages to the cargo of a barge which ran aground on Chandeleur Island and alleged that the Coast Guard was negligent in failing to maintain warning of the presence of the island. The Court agreed with the government that the Coast Guard was not obligated to furnish the lighthouse service; however, once discretion was exercised by the Coast Guard in providing this service, thereby fostering reliance of seafarers on the assistance of the light, a failure to exercise due care in such operational activities as ascertaining that the light was kept in good working order, or in the event the light became extinguished, either to repair the light or give warning that it was no longer operating, was actionable.

An additional defense tendered by the government was that the maintenance of a lighthouse was a uniquely governmental function, in which no private individual engaged and thus was barred by virtue of the condition in the Federal Tort Claims Act providing that an action may be brought against the United States ". . . if a private person would be liable. . . ."[8] Rejecting this argument, the Court held that 28 U.S.C. section 2674 provided that the United States would be liable ". . . in the same manner and to the same extent as a private individual under like circumstances. . . . ," and that to accept the government's

488 (1953); 39 B.U.L. REV. 268 (1959); 25 FORDHAM L. REV. 167 (1956); 34 TEXAS L. REV. 956 (1956). See also Annot., 19 A.L.R.2d 845 (1951).

[5]Fair v. United States, 234 F.2d 288, 296 (5th Cir. 1956). See also United States v. Gregory, 300 F.2d 11 (10th Cir. 1962); Hernandez v. United States, 112 F. Supp. 369 (D. Hawaii 1953).

[6]346 U.S. 15, 35-36 (1953).

[7]350 U.S. 61 (1955).

[8]28 U.S.C. § 1346(b). The Government was relying on holdings in Dalehite v. United States, 346 U.S. 15 (1953), and Feres v. United States, 340 U.S. 135 (1950).

theory would read the statute as ". . . imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person and it would thus push the courts into the 'non-governmental-governmental' quagmire that has long plagued the law of municipal corporations."[9] Furthermore, all governmental activity may be termed "uniquely governmental" and the Federal Tort Claims Act had been enacted for the very purpose of waiving sovereign immunity under certain circumstances.

Even after *Indian Towing*, determination of a discretionary function was not free from difficulty. Because of uncertainties with respect to its definition, several courts have refused to allow the designation of discretionary or operational acts to be disposed of on a motion to dismiss[10] or on a motion for summary judgment.[11]

In conformity with the *Indian Towing* decision, the courts have found that the duty to take action in a certain area was discretionary, but once this responsibility was assumed, the acts necessary to carry it out were operational. Thus, there was no discretion insulating the government from liability for negligently performing helicopter rescue operations,[12] marking a wrecked vessel so as to create a hazardous trap,[13] rendering negligent medical care,[14] abandoning attempts to rescue a shrimper off the Florida coast,[15] constructing and maintaining an electrical substation in dangerous condition,[16] or in planning dredging operations which caused subsidence of wharves.[17]

The line of demarcation between discretionary and operational acts depends in large measure upon where the court determines the planning level to be. For example, in *American Exch. Bank v. United States,* failure to provide handrails on the Post Office building was an operational function; the "immune" discretionary or planning level,

[9]Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955); *accord,* Rayonier v. United States, 352 U.S. 315 (1956).

[10]Builders Corp. of America v. United States, 259 F.2d 766 (9th Cir. 1958); Fair v. United States, 234 F.2d 288 (5th Cir. 1956); California v. United States, 151 F. Supp. 570 (N.D. Cal. 1957); *cf.* Sisley v. United States, 202 F. Supp. 273 (D. Alaska 1962); Hungerford v. United States, 192 F. Supp. 581 (N.D. Cal. 1961).

[11]Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., 126 F. Supp. 406 (N.D. Cal. 1954). *But see,* Wheeldon v. United States, 184 F. Supp. 81 (N.D. Cal. 1960).

[12]United States v. Lawter, 219 F.2d 599 (5th Cir. 1955).

[13]Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951).

[14]Costley v. United States, 181 F.2d 723 (5th Cir. 1950); Rufino v. United States, 126 F. Supp. 132 (S.D. N.Y. 1954); Grigalauskas v. United States, 103 F. Supp. 543 (D. Mass. 1951); Dishman v. United States, 93 F. Supp. 567 (D. Md. 1950).

[15]United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960), *cert. denied,* 364 U.S. 933 (1961).

[16]Pierce v. United States, 142 F. Supp. 721 (E.D. Tenn. 1955), *aff'd.* 235 F.2d 466 (6th Cir. 1956).

[17]Jemison v. The Duplex, 163 F. Supp. 947 (S.D. Ala. 1957).

on the other hand, was involved in the decision to erect the Post Office building.[18] Likewise, in *Montellier v. United States*, discretion was exercised in deciding to make a record-breaking round trip, non-stop, non-refueling flight, but negligence in flying the airplane was actionable.[19]

It is apparent from the foregoing authorities that a claim based on the government's negligence with respect to disaster damage must be predicated on acts which fall within a governmental decision assuming some responsibility or duty. For example, a failure of the government to take any part in warning, evacuating, or assisting the populace would seem to be excluded; whereas once the government has decided to engage in such pursuits, the negligent performance of acts within that decision could constitute a cause of action.

III. The Defense of Misrepresentation

The government may not be held liable for damages consequent to a misrepresentation on the part of one of its employees.[20] Both willful and negligent misrepresentations are within this exception.[21] Nevertheless, recovery under the Federal Tort Claims Act has been permitted in two cases wherein a misrepresentation concerning claimant's state of health was present.[22]

In *Jackson v. United States*, plaintiff's claim was founded on the alleged negligence of doctors at a government hospital in not informing plaintiff of the fact that a surgical needle was left in plaintiff's abdomen during an operation, and in not attempting to remove it at a later date.[23] The government did not avail itself of the defense of misrepresentation, but instead, in a stipulation admitted it was negligent. *United States v. Reid* involved a failure by a government doctor to advise plaintiff of his incipient tuberculosis exhibited by an X-ray, and an assurance by the doctor that nothing was wrong with plaintiff.[24] The court held that faulty medical advice interfered with proper tests and treatment until plaintiff's tuberculosis reached an advanced stage and the government was held liable. The question of misrepresentation was not discussed in the court's opinion.

The later case of *Hungerford v. United States* granted the govern-

[18]257 F.2d 938 (7th Cir. 1958).

[19]202 F. Supp. 384 (E.D. N.Y. 1962).

[20]28 U.S.C. § 2680(h); see Hall v. United States, 274 F.2d 69 (10th Cir. 1959); 48 Geo. L. J. 778 (1960); 47 Va. L. Rev. 139 (1961).

[21]National Mfg. Co. v. United States, 210 F.2d 263 (8th Cir. 1954); Jones v. United States, 207 F.2d 563 (2d Cir. 1953); *cert. denied*, 347 U.S. 921 (1954).

[22]United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Jackson v. United States, 182 F. Supp. 907 (D. Md. 1960).

[23]182 F. Supp. 907 (D. Md. 1960).

[24]251 F.2d 691 (5th Cir. 1958).

ment's motion to dismiss a cause of action based on the government doctors' failure to tell plaintiff of his organic brain injury;[25] the court held the doctors did nothing to injure plaintiff but were simply guilty of a negligent misrepresentation which was only an omission. Plaintiff relied on *Otness v. United States,* in which recovery was allowed on claimant's cause of action grounded on the negligent performance of a duty, but disallowed a claim based on a false bulletin issued by the Coast Guard.[26] The court in *Hungerford* declared that the doctors owed plaintiff no duty to make a careful examination independent of the duty to make a non-negligent diagnosis thereby distinguishing *Otness v. United States.* The court pointed out that no negligent treatment was given, and adhering to the rule in *Clark v. United States,*[27] the court stated that a claim may not be made on a misrepresentation based upon a gratuitous inspection even when that inspection is negligent. The decision in *United States v. Reid*[28] was not regarded as binding.

In *Otness v. United States,* the court held that the Coast Guard failed in its duty to exercise care in maintaining navigational aids in that defendant abandoned its search for a channel light after two incompetent attempts to find it.[29] The Coast Guard then issued a bulletin to the effect that no part of the channel light remained above the natural contour of the bottom. Plaintiff's vessel collided with an unknown object and sank. Shortly thereafter, the missing channel light was found and when it was raised, paint smears similar in color to that on the bottom of plaintiff's vessel and wooden slivers were found on one of the steel legs of the structure. Rejecting the government's first defense of contributory negligence, the court agreed with the second defense that plaintiff could not be permitted to recover for loss occasioned by reliance upon the negligent misrepresentation of the defendant, contained in the bulletin; however, the validity of this defense did not prevent liability from attaching. Defendant's negligence arose from its duty *voluntarily assumed* to aid mariners in traversing this passage of water.

Likewise, in *Builders Corp. of America v. United States,* plaintiffs sued for damages suffered when, contrary to orders, certain agents of the United States prevented military and civil personnel from occupying plaintiffs' dwelling houses adjacent to a military installation.[30] Certain misrepresentations were allegedly made by government employees regarding the condition of the houses. The Court of Appeals

[25] 192 F. Supp. 581 (N.D. Cal. 1961).
[26] 178 F. Supp. 647 (D. Alaska 1959).
[27] 218 F.2d 446 (9th Cir. 1954).
[28] 251 F.2d 691 (5th Cir. 1958)
[29] 178 F. Supp. 647 (D. Alaska 1959).
[30] 259 F.2d 766 (9th Cir. 1958).

for the Ninth Circuit reversed a motion to dismiss and held that the misrepresentation did not constitute the gravamen of plaintiffs' complaint, which was primarily based upon the alleged arbitrary, unjust action on the parts of agents of the government. In *Somerset Food Co. v. United States,*[31] and *Indian Towing Co. v. United States,*[32] negligent performance of a duty was held actionable despite the fact that a misrepresentation was necessarily involved; however, the misrepresentation feature was not treated in the opinions.

Emerging from these cases is the idea that a misrepresentation may not be fatal to claimant's suit if it does not constitute the gravamen or gist of the cause of action, or has not been distinguished as a separate element in cases wherein the government has undertaken a duty and has been negligent in its fulfillment.

A very recent decision of the United States Supreme Court has cast considerable doubt with respect to the success of a claim which in any way involves a misrepresentation, even if it be incidental, or an additional basis of recovery. In *United States v. Neustadt,* an F.H.A. appraiser negligently inspected a home plaintiffs were interested in purchasing and, relying on the appraiser's estimate, plaintiffs bought it.[33] Serious structural defects were found immediately thereafter, which a qualified inspection would have discovered. The District Court held the appraiser must meet the standard care of a private appraiser, privately employed, and held that common carelessness cannot be classed as a misrepresentation merely because it is embodied in a report. The Court of Appeals for the Fourth Circuit found that the government owed plaintiffs a specific duty as purchasers of the property and that damage resulted when this duty was improperly performed. Since misrepresentation is present in many phases of the law of negligence, it does not necessarily follow that such a case falls within the exemption of the Federal Tort Claims Act especially where it involves not only a misrepresentation but a negligent performance of a definite duty owed to plaintiffs.

Granting certiorari, the Supreme Court reversed the judgment below.[34] The plaintiffs' argument that the misrepresentation exclusion does not apply when the gist of the claim lies in the negligence underlying the inaccurate representation, and thus, that the claim arises out of negligence rather than misrepresentation was rejected. The Court observed that when the loss suffered is caused by the breach of a specific duty owed by the government to an individual, there is a duty to use

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[31] 193 F.2d 631 (4th Cir. 1951).

[32] 350 U.S. 61 (1955). See also Pioneer S.S. Co. v. United States, 176 F. Supp. 140 (E.D. Wis. 1959).

[33] 281 F.2d 596 (4th Cir. 1960).

[34] 366 U.S. 696 (1961).

care in obtaining and communicating information upon which that person may reasonably be expected to rely. However, this only states the traditional and commonly understood legal definition of the tort of negligent misrepresentation as clearly shown by prevailing authorities. The Court noted that had Congress intended to exclude only deliberate false misrepresentation, the word "deceit" would have sufficed. In addition, despite the fact that plaintiffs were owed a specific duty there is nothing to infer that, in this case, Congress meant to suspend the application of the misrepresentation conception of the Tort Claims Act.

It is interesting to note that the Supreme Court felt that Congress did not intend to convert an F.H.A. appraisal into a warranty of value or otherwise extend to the purchaser any actionable right of redress in the event of faulty appraisal. The court cited as its authority statements to this effect from the committee hearings in both houses of Congress prior to the enactment of the Housing Act.

The *Neustadt* treatment of misrepresentation could sharply limit the basis upon which a suit for disaster damage could be brought. Its broad interpretation of this exception is somewhat reminiscent of the Court's first pronouncement of the discretionary function in *Dalehite v. United States,* where virtually all governmental agents' acts were included within the "discretionary function" provision.[35] However, the more liberal case of *Indian Towing Co. v. United States* subsequently modified this interpretation.[36] Whether the court will experience a similar change of viewpoint with regard to *Neustadt* remains to be seen.

IV. Some Recent Cases Arising Out of Disasters

In the Texas City disaster, which took place on April 16 and 17, 1947, approximately 560 persons were killed and 273 suits were filed for damages resulting from this occurrence. While the *S. S. Grand Camp* was loading a cargo of FGAN, fertilizer grade ammonium nitrate, a fire broke out and the ship exploded. The District Court found negligence on the part of government employees and rendered a decision in favor of plaintiffs. The Court of Appeals for the Fifth Circuit, in *In re Texas City Litigation,* reversed the finding for plaintiffs on the ground that the "discretion" exception immunized the United States from charges of negligence.[37] The government employees who launched the plan, as well as those who manufactured and shipped the fertilizer, were held to be acting under discretionary authority delegated from the Secretary of War. Moreover, charges of negligence in fighting the fire

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[35] 346 U.S. 15 (1953).
[36] 350 U.S. 61 (1955).
[37] 197 F.2d 771 (5th Cir. 1952).

were denied because there was no evidence that the Coast Guard failed to perform a duty; and further, no liability of a private individual was found to be even remotely analogous.

The Supreme Court's consideration of this case, under the title of *Dalehite v. United States,* affirmed the Court of Appeals' decision, pointing out that it was a cabinet level decision to institute the export of fertilizer.[38] The Court pointed out that the last contact the government had with the FGAN was the specification of the bag labels and bills of lading. After this, the FGAN was physically in the hands of non-government agents. There was serious room for speculation that the most directly operative fact causing the immediate fire arose from errors committed by the French Council longshoremen of ship staff. The Court found that even this last contact was discretionary since the plan had been prepared in this regard by the transportation officer of the director's office. His decision in the matter was dictated by the I.C.C. regulations.

In *National Manufacturing Co. v. United States,* a Kansas River flood inflicted property loss and damage on plaintiffs who alleged that the Army Engineers' weather and river forecasters and members of the geological survey section knew the river was reasonably likely to overflow and inundate sections of Kansas City but failed to use care in assembling, analyzing, and distributing such information.[39] Moreover, false assurances of safety were given that there was no need for plaintiffs to remove property, and that this misinformation was distributed in violation of the government employees' duty to ascertain whether the river would overflow. The government's chief defense—that under 33 U.S.C. section 702C no liability attached to the government for damage from flood waters—defeated plaintiffs' claims. The court found that the exceptions of misrepresentation and discretionary function would also bar plaintiffs' recovery.

Clark v. United States involved a claim resulting from a Columbia River flood in which plaintiffs' charges of negligence included one involving the distribution of a bulletin on the morning of the flood which stated that, barring unforeseen consequences, the flood would not occur that day.[40] The court pointed out that the overflowing of the river was an unforeseen event, and that the bulletin contained no false assurances of safety. Recovery was barred under the exception of negligent misrepresentation as well as 33 U.S.C. section 702C, denying liability for floodwater damages.

In *Tillman v. United States,* a landowner sued for damages from an unprecedented flood of the Columbia River allegedly resulting from

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[38] 346 U.S. 16 (1953).

[39] 210 F.2d 263 (8th Cir. 1954).

[40] 218 F.2d 446 (9th Cir. 1954).

the cutting of an underpass through the embankment by the Oregon State Highway Commission to provide entrance to and egress from the housing project caused to be constructed by the United States.[41] The court found the evidence was insufficient to show that the actions or omissions of employees of the United States caused the damage, especially in view of the fact that the United States had no control over the embankment. The court asserted that the claim should be pressed against the Oregon State Highway Commission.

V. Disaster Warnings

It is submitted that under the theory of failure to warn, recovery could be had under the Federal Tort Claims Act where there was disaster not involving floodwater damage. In *Indian Towing Co. v. United States* the Supreme Court held that the Coast Guard was obligated to use due care to discover that the lighthouse was not operating and to repair the light or give warning that it was not functioning.[42]

In *Fair v. United States,* Captain Hayward of the United States Air Force shot and killed a student nurse, two detective guards, and then committed suicide.[43] Because of Hayward's threats, the guards of Burns Detective Agency had been hired to protect the nurse and other persons in the hospital. The Provost Marshal promised Burns that they would be notified of any proposed release so that adequate precautions could be taken for the safety of the nurse and her guards. Nevertheless, Hayward was released without notice to Burns, after a cursory psychiatric examination. Charges of negligence included releasing Hayward when his threats were known, failing to make a reasonable examination, failing to keep Hayward under observation for a sufficient time, and releasing him from the hospital without warning, thereby violating a promise. The Court of Appeals for the Fifth Circuit reversed the motion to dismiss holding that the "discretionary function" could not be determined on such motion.

Failure to warn has been the basis for recovery in a variety of situations. Examples include: the failure to warn a pilot of a thunderstorm, thereby forcing him to bail out, where the canopy from his aircraft consequently struck and killed plaintiff's decedent;[44] the omission of a warning that unexploded shells might be in an area where plaintiff gathered scrap metal pursuant to an agreement with U. S. Army officials;[45] the failure to warn workmen of a dangerous condition in an

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[41]232 F.2d 511 (9th Cir.), *cert. denied,* 352 U.S. 842 (1956).

[42]350 U.S. 61 (1955).

[43]234 F.2d 288 (5th Cir. 1956).

[44]Bright v. United States, 149 F. Supp. 620 (E.D. Ill. 1956).

[45]United States v. White, 211 F.2d 79 (9th Cir. 1954).

electrical substation;[46] and the absence of warning of the hazards inherent in carrying a surveyor's rod near overhead power lines.[47]

Two suits are presently pending in the United States District Court for the Western District of Louisiana, where relatives of Hurricane Audrey victims are seeking a total of over 10,000,000 dollars under the Federal Tort Claims Act. Hurricane Audrey struck the Louisiana coast at Cameron Parish on June 27, 1957, killing approximately 600 people, and resulting in property damage in the millions of dollars. Arriving in the early morning of Thursday, June 27, 1957, with winds of over 100 miles per hour and driving rain and tides of ten to fifteen feet above mean sea level, she was the worst June hurricane on record.

The chief of the Weather Bureau, directed by the Secretary of Commerce, is charged with the duty of forecasting weather, issuing storm warnings, displaying weather and flood signals, and distributing meterological information.[48] On June 24, 1957, at 10:30 p.m. the New Orleans Weather Bureau issued a bulletin stating that a tropical depression was located on the Gulf of Mexico about 300 miles southeast of Brownsville, Texas. At 4:00 a.m., on June 25, 1957, the bureau issued another bulletin stating that the tropical depression in the southwest Gulf of Mexico had remained nearly stationary during the night. It further stated that the depression was about 350 miles southeast of Brownsville, Texas. Advisory No. 1 was issued by the New Orleans Weather Bureau at 12:00 noon on June 25, 1957, and it was by this advisory that the disturbance was classified as a hurricane and was officially named Audrey. It located the hurricane at about 380 miles southeast of Brownsville, Texas. The advisory stated that the highest winds were estimated at about 75 miles per hour in a small area near the center and that gales extended outward for 100 miles. The advisory further stated that the hurricane would move northward at about five miles per hour.

Advisory No. 2 was issued at 4:00 p.m. on June 25, 1957, locating the hurricane 350 miles southeast of Brownsville, Texas, and reported it northbound. The highest winds were estimated at about 100 miles per hour near the center and the northward movement at about five miles per hour.

The bureau issued Advisory No. 3 at 10:00 p.m., June 25, 1957, stating that Hurricane Audrey was increasing in size and was located

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[46]Pierce v. United States, 142 F. Supp. 721 (S.D. Tenn. 1955), *aff'd*, 235 F.2d 466 (6th Cir. 1956).

[47]Epps v. United States, 187 F. Supp. 584 (E.D. S.C. 1960); Hardy v. United States, 187 F. Supp. 756 (E.D. S.C. 1960).

[48]15 U.S.C. § 313. See also 14 U.S.C. § 90 relating to the authorization of the Coast Guard to operate floating ocean stations "for the safe and efficient protection of air traffic"; and 33 U.S.C. § 706 authorizing the maintenance by the Weather Bureau of a network of recording and non-recording precipitations.

about 500 miles southwest of New Orleans and moving northward at about seven miles per hour.

On Wednesday, June 26, 1957, at 4:00 a.m. Advisory No. 4 was issued. It stated that the hurricane had continued to increase in size as it moved northward slowly and was centered about 460 miles southwest of New Orleans. The highest winds were estimated at 100 miles per hour near the center and the gales were estimated to extend 150 to 200 miles from the center. The advisory stated that tides were expected to be two to three feet above normal along the Louisiana coast. On Wednesday, June 26, at 10:00 a.m., Advisory No. 5 was issued in which the hurricane watch was changed to a "hoist hurricane warning" along the Louisiana coast. It stated that the hurricane was continuing to move slowly northward and was centered at about 400 miles southwest of New Orleans with highest winds estimated at 100 miles per hour near the center. Gales were estimated to extend out 150 to 200 miles. Advisory No. 5 contained this paragraph:

> Indications are for north or a little east of north movement at 7 to 10 MPH with the center reaching the Louisiana coast late Thursday. However, due to the size of the hurricane, gales will start along the Louisiana coast tonight. Tides are rising and will reach 5 to 8 feet along the Louisiana coast and over the Mississippi Sound late Thursday. All persons in low exposed places should move to higher ground.

The Weather Bureau issued Advisory No. 6 at 4:00 p.m. Wednesday, June 26, 1957, in which it was stated that Hurricane Audrey was moving northward at about ten miles per hour and was centered about 300 miles south of Lake Charles, Louisiana. The highest winds were estimated at about 100 miles per hour near the center with gales extended outward 150 to 200 miles. This advisory further stated that the center of the hurricane would reach the west or central Louisiana coast by late Thursday.

On Wednesday, June 26, 1957, at 7:00 p.m., a bulletin was issued by the New Orleans Weather Bureau advising that Hurricane Audrey was centered about 270 miles south of Lake Charles, Louisiana, and moving northward at about ten miles per hour. This statement was contained in the bulletin: "This speed should bring the center inland on the west Louisiana coast about dark Thursday." This bulletin stated further that the highest winds were estimated at 100 miles per hour near the center, and that tides were now up two to three feet along the upper Texas and Louisiana coast. The tide was expected to continue to rise reaching five to eight feet along the Louisiana coast and over the Mississippi Sound by late Thursday. Persons in low exposed places were advised to move to higher ground.

Then, at 10:00 p.m., on Wednesday, June 26, 1957, Advisory No. 7 was issued stating that Hurricane Audrey was centered about 235 miles

south of Lake Charles, Louisiana, moving northward at about ten miles per hour, and this movement was expected to continue. The area from High Island to Morgan City was expected to bear the brunt of the hurricane on Thursday. It was again stated that the tides would rise five to nine feet late Thursday, and that all persons in low exposed areas should move to higher ground.

Then, at 1:00 a.m., on June 27, 1957, a bulletin was issued stating that the hurricane had increased its forward speed and was moving northward at about fifteen miles per hour, and that the hurricane was centered about 150 miles south of the Port Arthur-Lake Charles area. It was expected to reach the coast near the Texas-Louisiana border with winds up to 100 miles per hour before noon Thursday.

Advisory No. 8 was issued on Thursday morning at 4:00 a.m., June 27, 1957, stating that Hurricane Audrey was about seventy miles south of Port Arthur, Texas, moving northward fifteen to twenty miles per hour, with the center expected to reach the Port Arthur area about mid-morning. Then a bulletin was issued at 7:00 a.m. on that same day stating that Hurricane Audrey was centered just off the coast to the south of the Port Arthur area. Advisory No. 9 was issued three hours later stating that Hurricane Audrey had moved inland near the Texas-Louisiana border.

As claimed in the suits, the people living along the coast in Cameron Parish, Louisiana, relied upon the advisories and bulletins, issued by the Weather Bureau, to the effect that the storm would not hit until late Thursday. Actually, at the time the bulletin of 1:00 a.m., Thursday, was issued, the force of the hurricane had arrived.

These suits contend that the United States Government, through the Weather Bureau, was negligent in failing to give adequate, clear, correct, and proper warnings concerning the nature, intensity, location, path, velocity, and speed of the hurricane, and in failing to give proper warnings concerning the storm tides. Plaintiffs contend that the advisories and bulletins failed to warn the inhabitants as to when the force of the hurricane would strike. Reference was made only to the "center" of the storm. The Weather Bureau was in error in advising when the center would strike the coast. The plaintiffs' charges are that these advisories and bulletins were not only negligently drafted but were not sufficient to satisfy the government's duty to warn. In addition, the charge is made that the government negligently failed to warn the residents concerning the storm tides.

Plaintiffs also point out that the advisories and bulletins did not even suggest that the people evacuate but advised the people to seek higher ground. The only higher ground in that area were the ridges along the coast, and the people who made it to these ridges were no better off than those on lower ground. The hurricane hit the coast during the early morning hours of Thursday, June 27, after the people

had gone to bed thinking that the storm would not arrive until late Thursday. Many of them had their cars packed and were planning to leave early Thursday morning, but awoke with the water surrounding them and their houses disintegrating. Not only did the force of the hurricane arrive before late Thursday, but so did the center.

A suit involving a claim for damages to a wharf by a seagoing vessel, also caused by Hurricane Audrey, has been tried.[49] In this case, the U.S. Court of Appeals, Fifth Circuit, reversed the trial judge who refused to award damages to the wharf owner on the grounds that the captain was not properly warned of the hurricane. The Court of Appeals must have had in mind the pendency of the death actions when it stated:

> As this was such a devastating catastrophe and there is or may yet be litigation growing out of it, we think it especially necessary to sound the caveat here that we are dealing with this record and this record only. What we have to say is not meant as an estimate by us on factual conclusions or legal principles which would apply to the whole occurrence.[50]

After reviewing the advisories and bulletins, Justice Brown in his inimitable style distinguished the tug master from that large group of people who were planning to leave but who counted on the "late Thursday" zero hour.

> (4) That left only two unknowns — *Where* would she strike? and *when* would she strike? Since a competent shipmaster must evaluate data continuously, he can certainly claim no surprise on *where* it would strike. Advisory No. 1 (June 25) fixed the fetal position of Audrey near Latitude 22.5, Longitude 93. Each subsequent report showed Audrey moving northward. Her position at 4:00 a.m. Wednesday, June 26, was 24.2-93.4, and at 10:00 a.m. at 25.1-93.3. She was heading right for the Louisiana-Texas boundary scarcely 40 miles to the west of Cameron. A chart, a pencil and a ruler if used would have taught him that unless things changed, his ship was right in Audrey's path. But he did not have to be even this methodical. All he had to do was listen since every Advisory warned that Audrey would likely strike the Louisiana coast. And by 4:00 p.m. Wednesday, June 26, this was even narrowed further to "west or central Louisiana coast."
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> (5) On the question of when, it is not nearly so clear. Indeed, the prediction that she would hit "late Thursday" was wrong. This advice was continued up through 10:00 p.m. Advisory No. 7 Wednesday, June 26. It was not until the 1:00 a.m. Bulletin on Thursday, June 27, that this was changed to "before noon today." But here again we are not assaying conduct of those unfamiliar with the sea and hurricanes or having no positive duty save to themselves. We are dealing with a

[49] Boudoin v. J. Ray McDermott & Co., 281 F.2d 81 (5th Cir. 1960).
[50] *Id.* at 82.

> shipmaster who had an obligation to take reasonable care that his vessel not cause damage in the impending storm. Nor are we, for that matter, dealing with such a shipmaster who merely misjudged in point of time. That might have been the case had the tug master on Wednesday afternoon made a decision to leave at daybreak on Thursday, June 27. Here there is not even any showing that the tug master made a critical evaluation of relative courses of action in point of time. He was content for his ship to remain where she was. About the only excuse he offered was that he did not expect the tides to be as high or the storm as great.[2] Crediting everything he stated in his deposition the tug master was not misled as to time. He was not, nor does he claim to have been, in that large group of people who were planning to leave but who counted on the "late Thursday" zero hour.[51]

The responsibility of the United States government for disaster warnings will be determined when these suits are reviewed by the Appellate Courts.

VI. Conclusion

It would appear that where the record warrants relief against the United States government for the negligent acts of its employees, the federal courts will naturally allow recovery. However, some questions of recoveries against the federal government for catastrophes under the Federal Tort Claims Act are still in the developmental state. There is no doubt that in situations as illustrated by the *Indian Towing Co.* case, a cause of action can be stated, maintained, and damages recovered. It is noted, however, that the federal courts have been somewhat reluctant to expand governmental liability in this area and have developed and used to this end the technical defenses of "discretionary function" and "misrepresentation."

Policy considerations could very well influence the retention of limitations. One such consideration could be that an expansion of governmental liability to a larger extent may result in a virtual flood of litigation pouring into the federal courts at the very time when Congress had sought to limit the number of cases reaching the federal courts by restrictive amendment to the diversity statute. Also, the unusually large amounts of damages which are occasioned by such catastrophes could present an item to further complicate governmental fiscal affairs.

It certainly may be concluded at this time that once the government undertakes to perform a particular act, it will be held to a standard of reasonable care and will be liable for any damage caused by a negligent performance of such activity. With the ever increasing expansion of federal activities into all phases of American life this particular facet of tort law may well be the area of greatest expansion and development in the next decade.

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[51] *Id.* at 85.

APPRAISAL PROVISIONS OF THE STANDARD FIRE POLICY

*Thomas H. Watkins**

I. Introduction

The New York Standard Fire Insurance Policy contains an appraisal provision which states that if the insured and the insurer fail to agree on the cash value or amount of loss either of them is entitled to have this determined by competent and disinterested appraisers.[1] The purpose of such an appraisal is to determine value, and not legal liability. As our system of law has matured, jurists have come to recognize that one of its functions is to provide and encourage methods of settling disputes without litigation. To attain this end, we have developed the areas of novation, arbitration and appraisal. The courts today welcome the concept of settlements outside the courtroom.[2] "It is to the interest of the state that litigation should cease, and courts will always look with favor on agreements and settlements looking to that end. . . ."[3] The Mississippi Supreme Court has said that the suggestion of settlement of a dispute, ". . . is in accord with the public interest that parties may settle between each other as to all items in controversy which they can settle, so that any suit between them may thereupon be limited to the remaining items. . . ."[4]

With the possible exception of Delaware, every state and the District of Columbia and Puerto Rico permit arbitration of controversies by statute, common law rules or some combination of both.[5] Since a

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[1]The appraisal provision of the New York Standard Fire Policy reads: "(123) Appraisal. In case the insured and this Company shall (124) fail to agree as to the actual cash value or (125) the amount of loss, then, on the written demand of either, each (126) shall select a competent and disinterested appraiser and notify (127) the other of the appraiser selected within twenty days of such (128) demand. The appraisers shall first select a competent and (129) disinterested umpire; and failing for fifteen days to agree upon (130) such umpire, then, on request of the insured or this Company, (131) such umpire shall be selected by a judge of a court of record in the (132) state in which the property covered is located. The (133) appraisers shall then appraise the loss, stating separately actual (134) cash value and loss to each item; and, failing to agree, shall (135) submit their differences, only, to the umpire. An award in (136) writing, so itemized, of any two when filed with this Company shall (137) determine the amount of actual cash value and loss. Each (138) appraiser shall be paid by the party selecting him and the (139) expenses of appraisal and umpire shall be paid by the parties (140) equally." (Numbers indicate lines in original policy.)

[2]*E.g.*, DeWitt v. Miami Transit Co., 95 So. 2d 898, 901 (Fla. 1957).

[3]Young v. Barelli, 169 La. 319, 125 So. 258, 269 (1929).

[4]Browne v. Merchants Co., 186 Miss. 398, 404, 191 So. 58 (1939).

[5]See, *e.g.*, Miss. Code Ann. §§ 279-97 (1956); McLendon v. Shutt, 237 Miss. 703, 706, 115 So. 2d 740, 741 (1959).

true arbitration determines legal rights and liabilities, if arbitration is mandatory, the courts are, to some extent, ousted of their jurisdiction. Most arbitration statutes, therefore, are permissive rather than mandatory. The Mississippi statute, as an example, begins with the statement that, "all persons, . . . *may*, . . . submit to the decisions of one or more arbitrators any controversy. . . ." (Emphasis added.)[6] Any other approach by the legislature would have probably been ruled invalid, inasmuch as our constitution declares the courts to be open to provide a remedy at law for all persons injured,[7] and that no person shall be debarred from prosecuting or defending any civil cause before the courts of this state.[8]

The generally accepted recognition of arbitration, with the accompanying limitation thereon, is but an instance of encouraging parties to settle their differences. Indeed, it has been stated that: "Articles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings."[9]

The attitude of the law toward settlement of disputes has been ably stated:

> The law favors the amicable settlement of controversies, and it is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. The nature or extent of the rights of each should not be too nicely scrutinized. Courts should, and do, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious. Because they promote peace, voluntary settlements of differences between parties having legal capacity to contract in respect of their rights, where all have the same knowledge or means of obtaining knowledge concerning the circumstances involving their rights and where there are no fraud, misrepresentations, concealments, or other misleading incidents, must stand and be enforced if intended by the parties to be final, notwithstanding the settlement made might not be that which the court would have decreed if the controversy had been brought before it for decision. Such agreements are binding without regard to which party gets the best of the bargain or whether all the gain is in fact on one side and all the sacrifice on the other. It has been declared that to prevent the compromise of claims by compelling ad-

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[6]MISS. CODE ANN. § 279 (1956).

[7]MISS. CONST. art. 3, § 24.

[8]MISS. CONST. art. 3, § 25.

[9]Hutto v. Jordan, 204 Miss. 30, 42, 36 So. 2d 809, 812 (1948).

justment of all controversies by litigation in court is against public policy.[10]

The appraisal provision of the standard fire policy is one of the encouraged methods of settling differences. Appraisal is often confused with other means of preventing litigation, particularly arbitration.[11] The two are dissimilar in many respects. The basic difference between arbitration and appraisal is that the former determines legal liability,[12] while the latter is used only to determine value regardless of liability.[13]

In Mississippi another important distinction lies in the source of these non-judicial determinations. Arbitration is a creature of statute, and the statute is permissive only. One party cannot compel another to submit to arbitration, nor may he prevent the other party from revoking an agreement to submit at any time before an award is made.[14] On the other hand, the appraisal provision of the standard fire policy is a matter of contract, supported by valuable consideration because it is written into the policy.[15] This appraisal provision is permissive only insofar as written demand by one party is necessary before it comes into play.[16] Thereafter, like any contract matter, it is mandatory, and the other party has no legal right to refuse compliance therewith.[17] The Mississippi Supreme Court has made the following differentiation between arbitration and appraisal:

> Arbitration is sometimes confused with other forms of procedure which have some points of similarity. For example, agreements in, or separate from, contracts, leaving to the decision of third persons questions of price, value, amounts, quantities, or qualities are not, strictly speaking, submissions to arbitration, nor are such third persons properly called arbitrators. Some of these so-called arbitrations are mere appraisements; others have some, many, or nearly all of the characteristics of arbitrations. All of them, in one or more particulars, differ from arbitrations. Appraisement, in particular, is perhaps most often confused with arbitration. While some of the rules of law that apply to arbitration apply in the same manner to appraisement, and the terms have at times been used interchangeably, there is a plain distinction between them. In the

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[10] 11 AM. JUR. *Compromise and Settlement* § 4 (1937).

[11] See, *e.g.*, Hartford Fire Ins. Co. v. Jones, 235 Miss. 37, 108 So. 2d 571 (1959). The court observed: "It seems that all of the lawyers and the court completely overlooked the fact that the report of the appraisers is not an arbitration award."

[12] See, *e.g.*, Hutto v. Jordan, 204 Miss. 30, 36 So. 2d 809 (1948).

[13] *E.g.*, Munn v. National Fire Ins. Co., 237 Miss. 641, 115 So. 2d 54 (1959).

[14] See, *e.g.*, Standard Millwork & Supply Co. v. Mississippi Steel & Iron Co., 205 Miss. 96, 38 So. 2d 448 (1949).

[15] *E.g.*, Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545, *suggestion of error overruled*, 173 Miss. 317, 160 So. 387 (1935).

[16] Standard Fire Policy, Line number 125.

[17] See, *e.g.*, *Ex parte* Birmingham Fire Ins. Co., 233 Ala. 370, 172 So. 99 (1937). *But cf.*, Ford v. Grocers' Mut. Ins. Co., 4 F. Supp. 911 (W.D. Pa. 1931).

> proper sense of the term, arbitration presupposes the existence of a dispute or controversy to be tried and determined in a quasi-judicial manner, whereas appraisement is an agreed method of ascertaining value or amount of damage, stipulated in advance, generally as a mere auxiliary or incident feature of a contract, with the object of preventing future disputes, rather than of settling present ones. Liability is not fixed by means of an appraisal; there is only a finding of value, price, or amount of loss or damage. The investigation of arbitrators is the nature of a judicial inquiry and involves, ordinarily, a hearing and all that is thereby implied. Appraisers, on the other hand, where it is not otherwise provided by the agreement, are generally expected to act upon their own knowledge and investigation without notice of hearings, are not required to hear evidence or to receive the statements of the parties, and are allowed a wide discretion as to the mode of procedure and source of information.[18]

II. Mechanics of Appraisal

When the insured under the standard fire policy suffers a loss, and cannot agree with the company on value, either may demand an appraisal. This demand usually takes the form of a letter from one of the contracting parties or his attorney to the other party or his attorney. Each party then has twenty days in which to select its competent and disinterested appraiser and to inform the other party of the selection. The company and the insured cannot attempt to exert any influence on the appraisal. The first order of business for the two appraisers is to select an umpire. If they fail to do so for fifteen days, then a court of record within the state makes the selection. After the umpire has been selected, it is time to go to work. The appraisers are to determine "actual cash value," which is the cash value of the property immediately prior to the catastrophe, and "loss," which is the cost of putting the property in its former condition with appropriate depreciation allowances.

There are no requirements governing the method by which appraisal is to be made. The appraisers may work independently of each other, or they may work together. An appraiser may consult other people for their opinions as to actual cash value and loss. Inasmuch as the appraiser gives no report on how he reached his conclusions, he may well consult people who are neither competent nor disinterested. This is one of the hazards of appraisal. It is not necessary, however, that the appraiser consult anyone. He may rely solely on his own abilities to ascertain actual cash value and loss. The appraiser must be competent and disinterested, so it is expected that he will be fair

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[18]Home Ins. Co. v. Watts, 229 Miss. 735, 748, 91 So. 2d 722, 726, *suggestion of error sustained on other grounds*, 229 Miss. 751, 93 So. 2d 848 (1957).

and diligent in making his determinations. After both men have completed their appraisal they come together to see if they can reach an agreement as to the amounts. If they have worked independently of each other, there will probably be some difference in their figures which often can be reconciled by the two appraisers. The umpire never actively participates in the proceedings, but if the appraisers fail to agree he then enters the picture.

The umpire is, in one sense, merely an appraiser. He cannot direct that either set of figures be adopted, nor may he order any type of compromise of the difference. All the umpire may do is make his own appraisal. Before an appraisal award may be made, two of the three persons appraising must agree. Once such agreement is reached, the appraisal is complete and the company, if liable, must pay the amount of the award.

Appraisal is risky at best. So long as the two parties have a bare difference of opinion they may negotiate, and either is free to reject any offer that is against his best interest. When the matter has been submitted to appraisal, however, the insured and the company may no longer participate in the proceedings, and either runs the risk of getting a poorer deal than his opposite number offered. On the credit side, the only alternative to appraisal is litigation. Appraisal is not a must when the parties disagree. One or the other must request it before it comes into play. If neither makes demand for appraisal, the insured is free to bring suit for his loss. A suit is more time-consuming, more expensive, and no more certain than appraisal.

III. Scope of Appraisal

The sole purpose of appraisal under the standard fire policy is the determination of cash values. The appraisers cannot determine matters, such as ownership of property,[19] which would affect the legal question of whether the company was liable for the particular loss. Courts and writers are prone to state that appraisers find value but not liability.[20] This is unfortunate because words tend to lose their meaning, and the meanings tend to become indistinct. Certainly an appraisal determines, to an extent, the amount of liability, but so does an adjudication concerning apportionment of loss or hazards covered by the policy. These latter findings would not properly be the subject of an appraisal.

If the appraisers find that the condition of the property immediately before the catastrophe is unchanged, there obviously has been no loss. It would seem sufficient in that event to report that the condition

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[19]See 45 C.J.S. *Insurance* § 1110 (1946).

[20]See, *e.g.*, 29A Am. Jur. *Insurance* § 1610 (1960).

of the property was not caused by the hazard insured against. Such a finding, however, was specifically rejected by the Mississippi Supreme Court in *Munn v. National Fire Ins. Co.*[21] This was a case involving windstorm damage to several buildings. The insured and insurer could not agree on the amount of damage so appraisers were appointed. This report contained an appraisal for all buildings concerned except the insured's dwelling. The damage to the dwelling appeared to have occurred before the windstorm, leading the appraisers to conclude it was not caused thereby and to give no report on this damage. The trial court felt bound by the appraisers' report, but the supreme court reversed saying:

> If appraisers have the power to look at the property and determine the cause of the damage, in addition to the extent thereof, they possess a power to arbitrarily say whether the insurance company is liable. That is just what was done in the case at bar. The appraisers, upon a mere cursory inspection of the premises, allowed nothing for damage to the walls, not because they were not damaged but because they thought the storm did not cause the damage. This was done without any kind of hearing. There was no taking of testimony or adjudication by the appraisers in a legal manner of the question at issue. That would simply deprive an owner of the property of his constitutional rights to have determined in a court of justice the liability of an insurer.[22]

Mr. Justice Ethridge, in dissenting, argued:

> Manifestly, it would be impossible for appraisers to determine the actual cost value of property before the storm without considering and determining the age, condition and deterioration in the structure itself, including the walls. The end result of the majority opinion is to conclude that, in appraising the value of the property before the storm, the appraisers cannot consider the condition of the walls. Yet this function is necessary to determine "before" value, and that is a condition precedent to ascertaining the loss.[23]

The dissent expressed a feeling that it was immaterial whether the appraisers reported "loss" in the amount of zero, or whether they reported that inasmuch as the present condition of the property existed before the windstorm it must have been caused by something else.

Although the limits of the appraisers' authority is freely discussed in the abstract, few cases have attempted to define a location of that line beyond which lies the determination of liability. A finding that there has been no loss means the company is not liable for the results of a particular catastrophe. On the other hand, a finding of some loss

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[21]237 Miss. 641, 115 So. 2d 54 (1959).

[22]*Id.* at 649, 115 So. 2d at 57.

[23]*Id.* at 652, 115 So. 2d at 58.

does not necessarily mean the company must pay for it, so an action on the policy may still arise.[24] It would seem that some of the difficulty encountered in this area could be avoided by restating the powers of the appraisers to the effect that they may make no determinations of law, and only those determinations of fact that are necessary in order to ascertain actual cash value and loss. In this way the question of whether the appraisers were delving into "liability" would become academic.

IV. Noncompliance and Waiver

Either party to an insurance contract may call for an appraisal. The only prerequisites are a bona fide disagreement as to actual cash value and loss, and a request in writing. The policy provides that when these conditions have been met the company and the insured shall each select a competent and disinterested appraiser. Occasionally one of the parties will fail to make this selection. If the insured is in default he cannot then prosecute an action on the contract. The policy itself states: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with. . . ."[25] Similar clauses have been construed as making appraisal, when requested by the company, a condition precedent to the insured's action on the policy.[26]

Failure to comply with a request for appraisal does not automatically terminate the insured's rights under the policy. The contract itself merely provides that an action cannot be maintained if there has not been compliance with the policy provisions. It has been determined in Mississippi that where appraisal is still possible the insured's failure to submit thereto only abates his action on the policy. In *Home Ins. Co. v. Watts*, the insured's automobile was damaged by fire.[27] The company requested an appraisal, and the insured named an appraiser. Subsequently the insured withdrew this appraiser, refused to appoint another, and brought suit against the company. In its answer the company raised this refusal as a defense, and moved for a peremptory instruction at the trial. When this was denied and the jury returned a verdict for the plaintiff, the defendant company appealed. The supreme court held that inasmuch as the automobile was still available for appraisal the plaintiff was not barred from his cause of

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[24]See Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 159 So. 545, *suggestion of error overruled*, 173 Miss. 317, 160 So. 387 (1935).

[25]New York Standard Fire Policy, Lines 157-60.

[26]*E.g.*, Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242, 255 (1889).

[27]229 Miss. 735, 91 So. 2d 722, *suggestion of error sustained on other grounds*, 229 Miss. 751, 93 So. 2d 848 (1957).

action, but an appraisal would be necessary before any suit could be maintained.[28] On the other hand, if the insured has made an appraisal impossible he will be barred from subsequently suing on the contract. In *Hartford Fire Ins. Co. v. Conner*, the insured's automobile was damaged by fire and the company requested an appraisal.[29] Instead of appointing an appraiser, the insured sold the remains of his automobile and proceeded to bring suit against the company for the loss he had sustained. The company's defense was based on the insured's failure to enter into the appraisal, and, when judgment was rendered for the plaintiff, the defendant appealed. The supreme court noted that the plaintiff's actions had made an appraisal impossible, then held: ". . . if an appraisal is a condition precedent to an action on the policy, and the failure to secure an award by an appraisal is due to the fault of the insured, the absence of such award is a bar to an action on the policy by him."[30] This case was reversed and judgment rendered for the defendant. Although both the *Watts* case and the *Conner* case involved automobile policies, they are discussed here because of the similarity of the appraisal provisions of the standard fire policy and the standard automobile policy.[31]

When the insurer fails to comply with the insured's request for appraisal, the insured may forthwith institute an action on the policy. The theory behind this rule is that the party who wrongfully prevents the appraisal will not be heard to raise it as a condition precedent to a suit.[32] Thus, if the company employs dilatory tactics that postpone the commencement of the appraisal, it cannot insist on appraisal after such becomes impractical.[33] When the company makes

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[28] *Id.* at 751, 91 So. 2d at 727.

[29] 223 Miss. 799, 79 So. 2d 236 (1955).

[30] *Id.* at 805, 79 So. 2d at 239.

[31] The appraisal clause of the standard automobile policy reads: "Appraisal—If the named Insured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the Named Insured or the Company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The Named Insured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

"The company shall not be held to have waived any of its rights by any act relating to appraisal."

[32] COUCH, INSURANCE § 1614 (1930).

[33] *E.g.*, Talbert v. Northwestern Nat'l Ins. Co., 167 La. 608, 120 So. 24 (1929).

futile any attempt at appraisal, its complaint that evaluation of the loss is now fraught with uncertainty will not be entertained.[34] The jury, rather than the appraisers, will determine the loss.

Before one party to an insurance contract can contend that the other is in default under the appraisal provision, he must have first requested the appraisal. If such request is not made, the court will consider the right thereto as waived. In a Mississippi case, the court declared: ". . . an arbitration stipulation of this character may be waived by failure of either party to demand its execution. In order to be entitled to the benefit of said stipulation it was the duty of appellant to put appellee in default by proposing to carry out said provision."[35] It is not necessary that such a waiver be expressed in any terms. It can be implied by the acts of the parties,[36] or the wrongful acts of the selected appraiser.[37] The right to appraisal will be held as waived where a demand not authorized by the contract is made, and no proper demand subsequently issued.[38]

Unqualified denial of liability under the policy can constitute a waiver of the appraisal provision. The rationale is that the disagreement is on the question of liability, and not on the question of value.[39] There can be no appraisal where there is no disagreement as to value. There is no waiver, however, when the company denies liability in excess of a stated amount.[40] Thus, for such a denial to amount to a waiver it must be an unqualified denial of all liability.[41] Furthermore, if this denial does not precede the company's answer in litigation, there has been no waiver. The Mississippi court has declared: ". . . the denial of liability which dispenses with the necessity of an appraisal must occur, except under special circumstances, before answering in a suit on the policy."[42] On another occasion the court said: ". . . we can see no good reason why an insurance company would be held to have waived the appraisal provision in a policy by denial of liability after the insured has refused to submit the matter to appraisers as required by the policy."[43]

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[34]*E.g.*, Dunn v. Springfield Fire & Marine Ins. Co., 109 La. 520, 33 So. 585 (1902).

[35]Mississippi Fire Ins. Co. v. Dixon, 133 Miss. 570, 582, 98 So. 101, 103 (1923).

[36]COUCH, *op. cit. supra* note 32, § 1613.

[37]*Ibid.*

[38]See Hamilton v. Connecticut Fire Ins. Co., 46 Fed. 42 (S.D. Ohio 1891), *aff'd*, 59 Fed. 258 (6th Cir. 1893).

[39]See Mississippi Fire Ins. Co. v. Dixon, 133 Miss. 570, 98 So. 101 (1923); 45 C.J.S. *Insurance* § 1135 (1946).

[40]*E.g.*, Bankers Fire & Marine Ins. Co. v. Draper, 242 Ala. 601, 7 So. 2d 299 (1942).

[41]See 29A AM. JUR. *Insurance* § 1617 (1960).

[42]Hartford Fire Ins. Co. v. Conner, 223 Miss. 799, 808, 79 So. 2d 236, 240 (1955).

[43]Home Ins. Co. v. Watts, 229 Miss. 735, 749, 91 So. 2d 722, 727 (1957).

As a general rule the insurer may submit to appraisal and then deny liability. It has been said:

> An award does not fix the liability of insurer, however, where both by the terms of the policy and of the submission it is limited in its effect to the determination of the amount of the loss; it merely determines the amount of insurer's liability in the event that he should be found liable, and leaves the question of insurer's liability to litigation. For reasons not connected with the award insurer may not be liable at all, but, if liable, he must pay the amount named in the award.[44]

Although it has not been judicially determined in Mississippi whether a company may have its maximum liability established by appraisal and then resort to the courts to determine if there is to be any liability at all, the majority opinion in one case suggests as much.[45] The court construed a report of the appraisers as a finding of no liability on the part of the company. This, it was held, would deprive the owner of his constitutional right to a judicial determination of a question of law.[46] The dissent, which took issue with the conclusion that the report was a finding of liability, was in accord with this holding and cited the above quotation.[47]

V. Valued Policy Law

Although the insurance contract provides that the parties may avail themselves of appraisal in the event they disagree as to value, an exception has, by statute, been engrafted onto this provision. The valued policy statute provides:

> When buildings and structures are insured against loss by fire, and situated within this State, are totally destroyed by fire the company shall not be permitted to deny that the buildings or structures insured were worth at the time of the issuance of the policy the full value upon which the insurance is calculated and the measure of damages shall be the amount for which the buildings and structures were insured.[48]

This means that in the event of total loss by fire the value is fixed by the face of the policy, and not by appraisal. The benefits of this statute cannot be waived or contracted away, even for valuable consideration.[49] Where there is a total loss, and an appraisal results in a finding that the value of the destroyed property is less than the face

[44] 45 C.J.S. *Insurance* § 1126 (1946); see Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N.W. 792 (1930).

[45] See Munn v. National Fire Ins. Co., 237 Miss. 641, 115 So. 2d 54 (1959).

[46] *Id.* at 649, 115 So. 2d at 57.

[47] *Id.* at 656, 115 So. 2d at 60.

[48] Miss. Code Ann. § 5693 (1956).

[49] *E.g.*, Hartford Fire Ins. Co. v. Shlenker, 80 Miss. 667, 32 So. 155 (1902).

value of the policy, the appraised value is of no effect.[50] This statute, therefore, ". . . writes out of a fire insurance policy any provision therein requiring an appraisal of the loss when the building insured has been totally destroyed."[51]

Inasmuch as the valued policy law renders the appraisal provision inoperative in the event of "total loss" the question arises as to when a loss is total. The basic rule on total loss is:

> . . . substantial parts of a building must remain in place, above the foundation, in order to prevent the destruction of the building from being total. If only the foundation of the building remains in place, the building is totally destroyed within the meaning of the policies, although some parts of the building remain in such condition as to be of value as salvage.[52]

The Mississippi court has also said that ". . . where the loss by fire is partial, but the injury by fire has rendered the building unfit for use for the purpose for which it was constructed, and there are ordinances or there is a law prohibiting its reconstruction, the loss in such cases is a total loss."[53] Thus, if the building has been rendered unusable by statute, and if repair is therefore impossible, the loss is total.[54]

VI. Conclusiveness of Appraisal and Impeachment of Award

Generally an award made pursuant to an appraisal is conclusive and binding on all parties. The fact that it is too great or too small is not sufficient reason to set it aside.[55] An award may be set aside because of fraud, gross mistake, incompetent or interested appraisers, or misconduct by the appraisers.[56] This area of the law has not been extensively developed in Mississippi, but in one case our court did say:

> Of course, it is elementary law that an appraisal is presumptively correct, but it is also the law that the court may set aside the appraisal where the award is so grossly inadequate or excessive as to amount to a fraud in effect, although fraud is not charged, or where the appraisers were without authority, or where there is a mistake of fact or to prevent injustice.[57]

In this case the award was set aside because the court felt it was based on findings of law by the appraisers.

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[50]*E.g.*, Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936).

[51]Franklin Fire Ins. Co. v. Brewer, 173 Miss. 317, 329, 159 So. 545, 547, *suggestion of error overruled*, 173 Miss. 317, 160 So. 387 (1935).

[52]*Id.* at 332, 159 So. at 548.

[53]Palatine Ins. Co. v. Nunn, 99 Miss. 493, 502, 55 So. 44, 45 (1911).

[54]See Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936).

[55]See Couch, *op. cit. supra* note 32, § 1620.

[56]See 45 C.J.S. *Insurance* § 1127 (1946).

[57]Munn v. National Fire Ins. Co., 237 Miss. 641, 651, 115 So. 2d 54, 58 (1959).

Under our valued policy law an award of less than the face value of the policy will be ineffective if the loss is total.[58] Even if the appraisers did value the loss at the amount stated in the policy, the insured's rights seem to be derived from the statute rather than from the appraiser.

Because of the standard mortgage clause,[59] a mortgagee of the insured property must be given notice of an appraisal. An appraisal conducted without notice to the mortgagee will not bind him,[60] and may fail to bind the insured owner.[61]

The contract of insurance itself provides that the appraisers are to be "competent and disinterested." If they fail to meet these qualifications an award rendered by them may be set aside.[62] If, however, the party complaining of the appraiser's lack of qualifications had knowledge of this lack prior to the award, but voiced no objection thereto, he will be precluded from later obtaining a new appraisal.[63] The appraisal may be set aside because of the misconduct of the appraisers. The appraisal being an informal thing with no hard and fast rules of procedure, misconduct must, as a practical matter, suggest fraud, bias or prejudice. Thus, when one appraiser and the umpire refuse to consider evidence essential to a correct determination, their award was set aside.[64] Generally an appraiser cannot impeach his own award.[65] There have been exceptions to this. Where an award was grossly erroneous, one of the appraisers was permitted to testify as to the misconduct of the other appraiser and the umpire.[66] This was allowed even though the appraiser testifying had also signed the award, since he had signed more through coercion than through concurrence.

VII. Conclusion

Appraisal is a convenient and encouraged method of resolving a dispute before it matures into litigation. As a method it is extrajudicial, but as a conclusive finding it is at least quasi-judicial. Either the company or the insured is entitled to an appraisal, and neither can refuse when the other requests it. Before making demand for appraisal one should realize its nature and what results might obtain. The

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[58]Yorkshire Ins. Co. v. Brewer, 175 Miss. 538, 166 So. 361 (1936).

[59]Miss. Code Ann. § 5695 (1956).

[60]See, *e.g.*, Aetna Ins. Co. v. Cowan, 111 Miss. 459, 71 So. 746 (1916).

[61]See, *e.g.*, Aetna Ins. Co. v. Pelham, 115 Miss. 229, 76 So. 153 (1917).

[62]See, *e.g.*, St. Paul Fire & Marine Ins. Co. v. Tire Clearing House, 58 F.2d 610 (8th Cir. 1932), where one appraiser was prejudiced and the award grossly inadequate.

[63]See Hyland v. Millers Nat'l Ins. Co., 92 F.2d 462 (6th Cir. 1937), *cert. denied*, 303 U.S. 645 (1938).

[64]Aetna Ins. Co. v. Murray, 66 F.2d 289 (10th Cir. 1933).

[65]See 45 C.J.S. *Insurance* § 1128 (1946).

[66]Phoenix Assur. Co. v. Davis, 67 F.2d 824 (5th Cir. 1933).

award is presumptively correct, so it is most difficult to have it set aside. Although the appraisers are competent and disinterested they may well tend to favor the party appointing them. Therefore, when the appraisers reach the point of adjusting the differences in their estimates, the stronger personality may prevail to the detriment of the other party. After the award is signed, it is too late for an appraiser to decide he made a bad deal, and it is too late for either party to decide he selected the wrong appraiser. It is sometimes difficult to obtain a competent appraiser. If a specialized line of merchandise is damaged but salvageable, it is conceivable that no one in the area would be able to properly ascertain the loss. Yet if one party selects an appraiser who cannot realistically appraise the loss, that party will not be heard to complain later.

Appraisal does have its advantages. It is faster and less expensive than litigation. If no problems are encountered, an appraisal can be demanded and the award made before a suit would have been triable. The appraisers have a free hand to examine records, survey the property at its situs, and confer with whomever they deem helpful. When they are competent, disinterested and conscientious, the award should be fair and equitable for both insured and insurer.

DOMICILE OF SERVICEMEN

*Lee Davis Thames**

I. Introduction

Some of the early cases in American jurisprudence contain obiter dictum to the effect that it is not legally possible for a soldier to change domicile because of his military status. The holding of the courts was to the effect that the facts of the particular case did not evidence the necessary proof of intent. In early America it might well have been said that a soldier could not change his domicile. The circumstances under which he served were such that few servicemen would ever have seriously entertained any idea of doing so. In those days, cities were few and small and civilization was ordinarily distant from where he served. In the Revolutionary War and the Civil War the soldier left his family at home and went away briefly to fight. There was no question as to his intent to return, and he usually did so intermittently at planting and harvest times. Even later the serviceman was still required to leave family and whatever civilization he enjoyed as a civilian, and go into a remote and lonely wilderness or a territorial outpost to fight Indians, bandits, or pestilence. Often such service was in a womanless wasteland which served only to intensify his urge to return from whence he came. Under such circumstances, it is no wonder that during such times Congress provided a method for a serviceman to "buy out" of the military service.

Yesterday's continental territories are today's states. Technological advances in transportation, communication, air conditioning and other conveniences provide inducements for servicemen to become domiciled in areas once highly undesirable. Distances have dwindled; inconveniences have changed to comforts; inducements to "make this place my home" exist just about everywhere. The military services have changed, too. Today incoming soldiers are often given a first assignment of their choice, and their families who accompany them often like the locale in which they find themselves. Established military policy provides for selection of a last assignment before retirement and the vast majority of military personnel avail themselves of this privilege. Military regulations today also provide that the government will ship household goods of a serviceman to any new continental domicile of choice at any time up to within one year after retirement. Therefore, under today's circumstances the serviceman and his family are constantly exposed to civilian communities into which they often integrate while in the service, to new and attractive vistas, and to climates and opportunities and ways of life which may be more healthful or otherwise more

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appealing than the old. The countless numbers of both retired and non-retired former servicemen retiring, for instance, in the southwestern United States bear eloquent testimony to this. Many have changed domicile before separating from the military service. Many have done so afterwards.

States have been quick to welcome and recognize changes in domicile by servicemen. Indeed, this recognition has been so readily forthcoming in many cases it amounts to more than mere recognition. States have sometimes insisted that servicemen have made a change in domicile, even in cases where servicemen never had any intention whatever of changing domicile and steadfastly denied ever having done so.[1] Hence, the Congress eventually passed a declaratory statute[2] which, while recognizing that a serviceman can change domicile, provides that he does not do so by virtue of his assignment and physical presence alone.

The essential elements required in order for anyone, civilian or military, to change his residence are: (1) an intent to abandon one's old domicile and to adopt a new domicile in a new location; and (2) concurrent physical or bodily presence in the new location. The fact of presence and the subjective intent to change must concur if the new domicile is to be established. It is not enough to have the intent to change without physical presence for some period in the new location, or to be present without intending to change domicile, or to be present and never have the intent to change. "It is not necessary, however, that the intent be conceived at the same time as the removal to the new locality. A subsequent concurrence of physical presence and intent to adopt the locality as a domicile is sufficient in this respect."[3] There seems to be a universal acceptance voiced in the early cases as well as the recent ones of the fact that, "although a soldier, while in the Army, neither acquires or loses his residence in the state in which his domicile was when he entered the Army, yet it is as competent for a soldier to abandon a domicile and acquire a new one as it is for any other citizen . . . ."[4]

Although the question has been raised primarily in divorce actions, there are many types of cases that have brought the issue before the court: administration of estate of a deceased serviceman;[5] change of a

[1]See Lyons v. Bordon, 200 F. Supp. (D. Hawaii 1961), where a Naval officer brought an action in federal court in Hawaii based on diversity of citizenship alleging that plaintiff was a domiciliary of Ohio and was in Hawaii by virtue of military orders. The court was reluctant to hold that plaintiff had not changed his domicile to Hawaii despite an avowed intent to remain domiciled in Ohio. See also Ex parte White, 228 Fed. 88 (D. N.H. 1915).

[2]The Soldiers' and Sailors' Relief Act, 54 Stat. 1178 (1940), 50 U.S.C. §§ 501-90 (1958).

[3]17A Am. Jur. *Domicil* § 18 (1957).

[4]Ames v. Duryea, 6 Lans. 155, 157 (N.Y. Sup. Ct. 1871), *aff'd*, 61 N.Y. 609 (1874).

[5]*E.g.*, *In re* Noyes' Estate, 182 Ore. 1, 185 P.2d 555 (1947).

serviceman's name;[6] right of a city to tax a serviceman living there;[7] federal jurisdiction based on diversity of citizenship;[8] jurisdiction of a state court to hear a case filed by a serviceman;[9] residence for voting purposes;[10] and right to serve process under the non-resident motorist statutes of the various states.[11] The cases generally hold that although in a particular instance, the serviceman had not changed his domicile, the domicile could have been changed had there been sufficient evidence of an intent to change. This is clearly the recognized rule.[12]

II. Effect of Military Orders on Physical Presence

While the early cases indicate that the courts were willing to accept the general rule that prevails today, there seems to have been a higher percentage of cases in which the courts found that the domicile had not been changed.[13] The early opinions reveal that many attorneys seem to have relied solely, or at least primarily, upon the physical presence of the serviceman as evidence of his intent to change his domicile. Apparently, at first there was little or no additional evidence of intent presented to the courts. As a result, the courts seemed to emphasize the lack of evidentiary value of physical presence by virtue of military orders, as appears in the case of *In re Green*.[14] Green brought action to have determined his right to vote in an election in Brooklyn. The evidence Green presented showed only that he had come to Brooklyn to enlist and that he had subsequently been assigned there. The court said, "he came to the barracks because he was ordered there . . . ."[15] There was no other evidence presented to show intent. The court held

[6] *E.g.*, Johnson v. Benton, 73 Cal. App. 556, 239 Pac. 60 (Dist. Ct. App. 1925).

[7] *E.g.*, Woodroffe v. Village of Park Forest, 107 F. Supp. 906 (N.D. Ill. 1952).

[8] *E.g.*, Schultz v. McAfee, 160 F. Supp. 210 (D. Me. 1958).

[9] *E.g.*, Hawkins v. Winstead, 65 Idaho 12, 138 P.2d 972 (1943).

[10] *E.g.*, *In re* Cunningham, 45 Misc. 206, 91 N.Y. Supp. 974 (Clinton County Ct. 1904).

[11] *E.g.*, Mangene v. Diamond, 229 F.2d 554 (3d Cir. 1956).

[12] Seegers v. Strzempek, 149 F. Supp. 35 (E.D. Mich. 1957); Humphrey v. Fort Knox Transit Co., 58 F. Supp. 362 (W.D. Ky. 1945); Wise v. Bolster, 31 F. Supp. 856 (W.D. Wash. 1940); Kinsel v. Pickens, 25 F. Supp. 455 (W.D. Tex. 1938); Champ v. Champ, 229 Ark. 292, 314 S.W.2d 603 (1958); Berger v. Superior Ct., 79 Cal. App. 2d 425, 179 P.2d 600 (Dist. Ct. App. 1947); Rhodes v. Rhodes, 80 Cal. App. 2d 723, 182 P.2d 275 (Dist. Ct. App. 1947); Oliver v. Oliver, 325 S.W.2d 33 (Mo. Ct. App. 1959); Trigg v. Trigg, 126 Mo. App. 284, 41 S.W.2d 583 (1931); Volmer v. Volmer, 371 P.2d 70 (Ore. 1962); Pettaway v. Pettaway, 177 S.W.2d 285 (Tex. Civ. App. 1943); Struble v. Struble, 177 S.W.2d 279 (Tex. Civ. App. 1943); Kankelborg v. Kankelborg, 199 Wash. 259, 90 P.2d 1018 (1939).

[13] This may account for the recent cases implying, at times, that originally a serviceman could not change his domicile. The results of the early cases rather than their rationale were relied upon.

[14] 5 Fed. 145 (C.C.E.D. N.Y. 1880).

[15] *Id.* at 148.

that one in military service could change his residence, but he "must do more than simply live at a place . . . by the orders of his commanding officer."[16] In *Gallagher v. Gallagher*, plaintiff in a divorce action was a captain in the Army.[17] He tried to establish the jurisdiction of the court by relying upon his physical presence by virtue of military orders, coupled with ". . . oral declarations of intent, unaccompanied by any act tending in the least to corroborate these declarations."[18] The court acknowledged the fact that the plaintiff could have changed his domicile, but held that there was not enough proof in that particular case. The court said: "Ordinarily, an act of removal to a certain location, coupled with the intent to make a permanent residence there, might be sufficient to fix a domicile, but that is because the removal is voluntarily made, which could not occur in the case of a soldier in active service."[19]

An Iowa court in *Harris v. Harris* held that one in active military service cannot rely upon physical presence in the new domicile at all in trying to establish a change.[20] The court said:

> Therefore, a person under such circumstances [active military service] cannot, in any proper sense of the term, have a residence anywhere other than the home he has left, since he has no choice as to where he goes, the time he can remain, or when he shall return. To gain either an actual or legal residence, there is, of necessity, involved at least the exercise of volition in its selection, and this cannot be affirmed of the residence of either a soldier or a sailor in active service.[21]

The court went on to recognize that military personnel can change their domicile, but held that the new domicile must be established by evidence independent of the move under military orders.

In *Smith v. Smith* the question of a serviceman's domicile was raised in a divorce action.[22] Plaintiff was a National Guardsman from Ohio assigned to Camp Shelby near Hattiesburg, Mississippi. The record revealed that plaintiff said that he intended to return to Hattiesburg when he was released from service. Apparently there was no evidence of any affirmative acts by plaintiff indicating a present intent. Thus, the case turned solely on the question of lack of intent. The court correctly held that "a mere intention to establish a residence at some time in the future is not sufficient."[23] Unfortunately, the court did not

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[16] *Id.* at 148-49.
[17] 214 S.W. 516 (Tex. Civ. App. 1919).
[18] *Id.* at 519.
[19] *Id.* at 518.
[20] 205 Iowa 108, 215 N.W. 661 (1927).
[21] *Id.* at 109, 215 N.W. at 662.
[22] 194 Miss. 431, 12 So. 2d 428 (1943).
[23] Id. at 434, 12 So. 2d at 429.

stop there once it disposed of the question of law in issue, but in obiter dictum intimated that plaintiff could not have acquired the domicile anyway since he was there by virtue of military orders.[24] The court relied for this proposition upon the *Harris* and *Gallagher* cases, among others. This is apparently the closest brush the Mississippi courts have had with the problem. It should be apparent from the foregoing that the cases cited do not support the proposition that plaintiff's presence by virtue of military orders precluded a change of domicile. Since the *Smith* case turned solely on a basic domicile problem not peculiar to the military status of the plaintiff, it is submitted that the case is not valid authority for the proposition stated in its dicta. This is especially true when the cases relied upon do not sustain the position attributed to them.

As one line of cases was developing which emphasized the involuntary nature of a move under military orders, another line of cases developed which acknowledged the existence of the problem but minimized its effect. One of the leading cases in this other line is *Ex parte White*.[25] White was in the active military service. He had been born and raised in the City of New York, and every time he returned from an overseas tour or took leave he would go back there. While stationed in New Hampshire, he married a local girl, and they lived off post in Portsmouth. This case arose when the city alleged that White's domicile had been changed to New Hampshire and assessed a tax against him. White refused to pay alleging that he was still a domiciliary of New York. Both sides emphasized the fact that White was present because of military orders. The court, however, tried to minimize that point saying:

> The general proposition that the presence of the army in a particular locality is not of its own volition, and is presumably only temporary, is probably subject to the qualification that actual residence of members of the army in a given locality may be of such a fixed and permanent character as to exclude altogether the idea of domicile or residence in any other locality, and to the further qualification that, though one in the military service is subject to the orders of superior officers, the

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[24]It is interesting to note that in Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948), the same problem was presented to the New Mexico court. Plaintiff, an Army captain, had expressed a desire to return to New Mexico after the war. The court, as did the Mississippi court, correctly decided the issue on the basis of future rather than present intent. The court, like the Mississippi court, could not resist the temptation of going further. In so doing, the New Mexico court announced the rule reflecting the better reasoned approach to the problem by saying that there was no evidence of intent to change domicile, but had there been, the soldier could have changed because "a new domicile may be acquired by a soldier as well as by any civilian if both the fact and intent concur."

[25]228 Fed. 88 (D. N.H. 1915).

> circumstances may be such that he remains so far sui juris, as to matters not involved in his military duties, that he may, if he so desires, change his domicile and establish it at any place he sees fit.[26]

The opinion continued by reducing the entire problem to an evidentiary question in which "the intention to change must be clear, and must be associated with something fixed and established as indicating such a purpose. . . ."[27] The court held that there was not sufficient evidence to establish a change of domicile. The fact of presence by virtue of military orders was not ignored by the court nor was it relied upon exclusively in determining the change of domicile.

This reasoning was taken one step further in the case of *Sweeney v. District of Columbia* in which the District of Columbia tried to tax the intangible personal property of Sweeney.[28] He had come there under military orders, and had remained as a civil service employee, although he constantly claimed Boston, Massachusetts, as his legal domicile. The court examined the problem of change of domicile by any federal employee, civilian or military, in reaching its decision. In attempting to justify its position, the District of Columbia tried to distinguish between various groups or types of federal employees, and in so doing considered the argument of the compulsive nature of a soldier's move from one location to another. The court rejected this theory saying: "Their [military personnel] residence here (or elsewhere), it is said, is not voluntary—they have no other choice. *But this confuses choice as to maintaining a place of abode with choice of personal presence in order to perform duty.*" (Emphasis added.)[29] This succinct statement seems to answer the question that has been posed by the conflicting cases thus far.

Presently, one should not overlook the personnel facilities that exist in the armed services such as compassionate transfer or reassignment, career counseling, choice of terminal assignment with a view to retirement, etc., which are designed to aid the individual in getting assigned to the place he so desires whenever possible. The statement made years ago that military personnel have no choice whatsoever as to where they will be assigned no longer holds true. Yet the distinction made in the *Sweeney* case remains valid. A serviceman may not have a choice of where he is to perform his job, but once there he can then exercise his choice of where he wishes to establish his domicile. If he grows to like his new location, he can then have the intent to make that his domicile after he has moved there. The only effect of the move is that it satisfies the requirement that he be physically present

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[26] *Id.* at 90.

[27] *Ibid.*

[28] 113 F.2d 25 (D.C. Cir.), *cert. denied*, 310 U.S. 631 (1940).

[29] *Id.* at 31.

in the new location. The individual must then immerse himself in the activities of the community and perform acts that he would not have done otherwise so as to have sufficient evidence of his intent to change. While civilians tend to remain in one place until they move permanently, the move itself, combined with physical presence in the new locality is strong evidence of the necessary intent; while military personnel cannot necessarily always rely upon that source of evidence, they still may be able to produce other evidence of intent.

III. Effect of Living on a Military Reservation

There is a mistaken notion that even if a serviceman can change his domicile he cannot do so unless he lives off a military reservation. Cases cited for this mistaken proposition are characterized by one of three features: (1) Adoption by citation of generalized "Headnote Law" of prior cases unsupported by the cases. (2) Selection, quotation and adoption, completely out of context, of isolated portions of prior judicial precedents. (3) Deciding the current cases on the basis of prior cases, which in turn quote portions of earlier cases, which have been carelessly or carefully misrepresented in the current briefs.

A good example of a case that has since been erroneously cited as holding that a serviceman cannot acquire new domicile while living on a military reservation is *Central Manufacturers' Mut. Ins. Co. v. Friedman*.[30] Here, an unmarried, unemancipated nineteen year old minor, drafted into military service, had his personal property stolen from locked barracks. The loss was covered by his father's personal property floater insurance policy affording coverage to a member of the insured's family of the same household. The case holds that military service does not create an unintentional change of domicile. The court pointed out that "he did not intend to change his domicile or residence and had made no change unless his military service alone brought about such change. . . . Here there is no evidence that Benno acquired a residence outside the Army Post with the intention of making it his home."[31] Having so decided the court further observed that:

> It is of course possible for him (soldier) to provide a house of his own, off the Post, where his family may live, if this is allowed by his superior officers; and it is possible for him to change his domicile by the proper proceeding while on leave. . . . He is as able as anyone to acquire a new domicile so far as conditions allow. . . . A new domicile may, however, be acquired if both the fact [physical presence] and intent occur.[32]

The *Friedman* case is among those which nevertheless have been

[30] 213 Ark. 9, 209 S.W.2d 102 (1948).

[31] *Id.* at 103-04.

[32] *Id.* at 104.

cited by some more eager or careless than astute, as a holding that a serviceman living on a reservation cannot acquire new domicile.

Other cases which are sometimes cited to sustain this erroneous position can be divided into three categories. The first comprises cases which merely state the theory without giving any rationale at all so that the validity of the conclusion cannot be examined. For example, in *Fiske v. Fiske* the court's jurisdiction was conducted on the grounds that plaintiff, an Army officer, was not a domiciliary of the State of Washington. In discussing the problem of living on post versus living off post, the court merely stated that "a member of the armed forces has the right to acquire a new residence while in the service, if he establishes a domicile off the military post and resides there for the required time [for getting a divorce] with the intention of making it his permanent residence."[33]

The second category is composed of those cases which superficially seem to sustain the theory that a serviceman living on a reservation cannot acquire a new domicile, but which upon close study actually do not do so. One such case is *Pendleton v. Pendleton*.[34] Defendant in the divorce action was in the Army assigned to Fort Riley, Kansas. Plaintiff lived on post with her husband. Neither party at any time expressed any intention of becoming residents of the State of Kansas. The court denied jurisdiction because of lack of intent. Furthermore, the court concluded by saying, ". . . it is not necessary to discuss the subject of the jurisdiction of the State of Kansas over the Fort Riley military reservation, and the question whether or not an officer of the Army of the United States may establish a domicile on such a reservation is not decided."[35]

Sealey v. United States[36] also falls into this category. The action was brought by plaintiff as administratrix of the estate of her deceased husband to recover the proceeds of two war risk insurance policies in force on the life of her husband at the time he was killed while on active duty in the Navy. A woman who, up until that time, thought herself to be married to the decedent (there was no divorce between decedent and plaintiff here), entered a special appearance attacking the jurisdiction of the Virginia court to appoint an administratrix on the basis that the decedent was a domiciliary of Pennsylvania, not Virginia, at the time of his death. Thus, the issue was raised as to whether or not the decedent had changed his domicile from his native Virginia to Pennsylvania. This part of the case turned on the lack of any evidence of intent. There was, however, obiter dicta discussing the

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[33] 48 Wash. 2d 69, 290 P.2d 725 (1955).
[34] 109 Kan. 600, 201 Pac. 62 (1921).
[35] *Id.* at 63.
[36] 7 F. Supp. 434 (E.D. Va. 1934).

question of whether or not a member of the Armed Services loses his domicile by absence under military orders. The court concluded that one does not unintentionally lose his domicile. Having concluded that, the court then added: "And the soldier residing at a government post on land ceded by a state to the government, is not a resident of that state, although the grant by the state of the site of the post reserves the right to serve process from the courts of the State."[37] The quoted portion was not used in discussing whether one could intentionally change; it was used to discuss the fact that one cannot *unintentionally* change his domicile.

The third category is comprised of those cases in which a rationale is stated for the proposition that a serviceman living on a reservation cannot acquire a new domicile. One of the earlier cases which analyzes the problem is *Lowe v. Lowe*,[38] a divorce action brought in Maryland courts by a wife who was residing with her husband on a military reservation in Maryland which was under the exclusive legislative jurisdiction of the United States. The facts did not reveal to the court whether or not the husband was in the military; so the court assumed he was a civilian employee residing on the military reservation. This does not affect the validity of the court's reasoning. The court examined at length the nature and extent of exclusive federal legislative jurisdiction. It concluded that the state has no power over the residents, and that such residents ". . . can exercise no political rights in the state; they are not subject to jury duty; neither can they be taxed for the maintenance of the state government, including the courts. . . ."[39] Therefore, the persons who reside on military reservations are not residing in the state for they are not physically present according to this theory. This is the old "federal island" concept which is also followed in *Zimmerman v. Zimmerman*,[40] a divorce action brought by the husband who was a serviceman. He had been to Oregon before entering the service and had wanted to move there from his home in Ohio, but he entered the service instead. He was stationed at a post in Oregon. The court held that he had not changed his domicile to Oregon stating, "where one in military service dwells upon a reservation which is located on land ceded by the state to the United States, it has been held that he cannot acquire domicile in that state for the reason that he is, in effect, living upon land which has ceased to be a part of the state and has become federal territory."[41]

There are three basic weaknesses in the argument advanced in the *Lowe* case. The first is that the rationale holds true, if at all, only on

[37] *Id.* at 437.
[38] 150 Md. 592, 133 Atl. 729 (Ct. App. 1926).
[39] *Id.* at 733.
[40] 175 Ore. 585, 155 Pac. 293 (1945).
[41] *Id.* at 297.

those military reservations which are under the exclusive legislative jurisdiction of the United States. Later cases that cite the *Lowe* case either overlook this very great limitation upon the effect of the decision or presuppose that all military reservations are on exclusive jurisdiction land. Anyone at all familiar with such reservations will readily admit that most military reservations in the United States are composed of not only exclusive jurisdiction land, but also concurrent or proprietary interests held in the land. Thus, it is entirely possible for an individual to be stationed at a military reservation and reside on land held by the federal government concurrently with the state. In such a case the state would have every power over the soldier that the *Lowe* case says it does not have, so long as exercise of that power by the state does not interfere with reserved federal functions. The second weakness is that, when the individual voluntarily submits to those powers and participates in the activities, the argument in the case falls. There are many taxes which can be imposed only upon one domiciled in the particular state, so that a civilian, who is temporarily residing in a state because of his job with a large national firm and who has no intention of making that state his domicile, would not be subject to most state taxes. Thus, if the serviceman or the civilian were to pay the taxes voluntarily and in so doing allege change of domicile, the state, by accepting tender of the tax money, would waive any argument based on the *Lowe* case in later denying a change of domicile. The same holds true for voting or jury duty or anything else which is restricted to a legal domicilary situated on land over which the state has jurisdiction. The argument has a third fallacy, in that if a legal domiciliary of any of the states which follow this rule enters active military service, and is stationed in that state or in another state on a military reservation under the exclusive legislative jurisdiction of the United States, that individual is still subject to the taxes of the state where he is a domiciliary, and he may still vote there by absentee ballot, etc. Thus, the state does have some power, although a military reservation on exclusive jurisdiction land is involved.

It must be concluded that if an individual lives on a military post and takes steps that will be good evidence of his intent to change his domicile, he may do so while living on the post. The elements for change of domicile require more than physical presence in the new state. The times that the individual goes off post in the performance of various acts evidencing intent to change, but not required by his military duty, should satisfy the requirement of physical presence in those states which persist in holding that living on a military reservation is not physical presence in the state. Once physical presence in the new locality has been accomplished, the only time required to effect the change of domicile is that split-second it takes to say to one's self

in all honesty and sincerity, "I hereby abandon domicile in my old state and I adopt this state as my new domicile." The only reason there is any emphasis at all on the question of how long the individual has been present in the new state is due to the fact it usually takes some time to perform acts and make statements which will be valid evidence of the existence of the intent.

The case of *Proper v. Proper*,[42] shows how domicile may be changed by a series of acts performed while the serviceman was physically present in the state several times, but for only a brief period each time. Defendant, an Army officer, was domiciled in California, and spent several days in Nevada in 1942 immediately after entering the service. He investigated the possibilities of opening a ski resort, and in 1943 he spent a few more days there for the same reason. He returned to Nevada in 1947 for two months before leaving on orders. In 1948 he returned for a short stay, concluded the ski resort business was not economically possible for him and returned to California. The court held that these sporadic visits to Nevada coupled with attempts on his part to get assigned there, and his action while away from Nevada which indicated he had every intention of returning to the state, established the fact that he had changed his domicile to Nevada and that the Nevada divorce obtained by the defendant could not be attacked in the California courts by the plaintiff.

The only real problem which confronts the courts is whether there is evidence of intent to change domicile exclusive of the fact of physical presence. The early case of *In re Town of Highlands*[43] recognized the evidentiary nature of the problem. The right to vote of residents on the United States reservation at West Point, New York, was being considered. The court acknowledged that the land was under the exclusive legislative jurisdiction of the United States "and persons having *no other qualifications* as residents than a resident *in such territory* are not residents of the state, and have no right to vote." (Emphasis added.)[44] This indicates the court's awareness of the fact that, while residence alone is not enough, additional evidence could prove that those persons living on the reservation were, in fact, domiciliaries of the state of New York. The *Town of Highlands* case was one of the many so-called "voting cases" in which is raised the question of residence for voting purposes on exclusive federal jurisdiction land. Other such cases are *Herken v. Glynn*[45] and *Arledge v. Mabry*.[46] These cases and those upon which they rely are often incorrectly cited to support

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[42]102 Cal. App. 2d 612, 228 P.2d 62 (Dist. Ct. App. 1951).

[43]22 N.Y. Supp. 137 (Sup. Ct. 1892).

[44]*Id.* at 139.

[45]151 Kan. 855, 101 P.2d 946 (1940).

[46]52 N.M. 303, 197 P.2d 884 (1948).

the contention that persons living on military reservations cannot change their domicile, but they do not so hold because they discuss only one of the elements of change of domicile, to wit: physical presence. The requisite intent is not even put in issue by those cases.

What evidence will establish domicile when one lives on a reservation may be found in *Percy v. Percy*.[47] Plaintiff, an Army doctor living on a military post in California, brought action for divorce. His wife attacked the jurisdiction of the court on grounds that he had not established a domicile there. The court held that he had established a change of domicile. Plaintiff's statement of intent to change was held to be corroborated

> . . . by the application to the state medical board for a license to practice; by his investigation concerning his right to practice in California, by his conference with physicians with a view to establishing a partnership here; by his declaration from time to time of his intention to remain in California; by his application to join a secret order which required a residence for six months in California as a condition to initiation; by his registration to vote, wherein he took the usual oath that at the next election he would have been one year within the State of California.[48]

This question of ability of a serviceman to change his domicile while living on a military reservation has been discussed specifically in two recent decisions. *Thomas v. Thomas*,[49] where the Washington court, as the Arkansas court, recognizes that living off post is not a condition to changing domicile. The Washington court said:

> Military personnel *can* acquire new domicile while stationed at a military installation. . . . While we find ourselves essentially in accord with the statement set forth above, we feel that the application of the rule cannot be reduced to a strict formula for establishing or proving domicile in all such cases. For instance, intent (the second element of domicile) cannot be effectively reduced to a mathematical equation, e.g., house + voting + car registration = intention to permanently reside. . . . Essentially the question is one of plaintiff's credibility.[50]

In *Volmer v. Volmer*,[51] the issue was whether the defendant husband had changed his domicile to Oregon. The defendant was assigned to a station in Oregon. The court stated the general principles as follows:

> The husband in the case at bar could have acquired a domicile in Oregon at any time during his tour of duty if he formed

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[47] 188 Cal. 765, 207 Pac. 369 (1922).

[48] *Id.* at 370.

[49] 58 Wash. 2d 377, 363 P.2d 107 (1961).

[50] *Id.* at 109-10.

[51] 371 P.2d 70 (Ore. 1962).

> the requisite intent to do so. . . . In the case of a soldier ordered to a post in this state, however, the fact of residence here, standing alone, whether he lives on or off the military post, is not evidence of the intent necessary for the acquisition of new domicile. . . . Local pride notwithstanding, a soldier's sojourn in this state under military orders is not voluntary. Therefore, there must be some evidence of intent beyond mere physical presence within the state.[52]

This court properly approached the problem from the standpoint of its being entirely an evidentiary question. The court felt the place of actual residence, be it on post or off post, was irrelevant standing alone. Thus, the place where the serviceman lives should not be permitted to prejudice his cause any more than it furthers his cause. The issue should be determined by other evidence. The *Volmer* case is a good example of the court's looking at evidence other than where the serviceman lived and making its decision on that.

IV. Acts to Prove Change of Domicile

The various cases cited thus far indicate that the courts require servicemen, as others, to give evidence of intent to change domicile by acts and declarations. Certain minimal requirements as to what would be sufficient on the part of the serviceman were stated in the case of *Teague v. District Court*.[53] Teague, a serviceman, had been sued in a tort action wherein jurisdiction was based on an allegation that he was a nonresident resulting in service of process under the nonresident motorist statute. The only evidence admitted to prove Teague's nonresidence in Utah was that his vehicle was registered and licensed in North Carolina. Teague then brought the above action to restrain the lower court in the tort action. The court held that a serviceman could change residence, and that the evidence concerning the vehicle was not sufficient to support a contention of nonresidence when the serviceman alleges change of domicile to the state. The court indicated a change of domicile could be shown by the accumulation of "indicia of some degree of permanency, such as bank accounts, telephone listings, charge accounts, etc."[54] It is considered that the serviceman should be required to take steps in areas such as registering to vote, application for homestead exemption, application for resident hunting and fishing licenses, etc., wherein he would have to state unequivocally and in writing that he was a domiciliary of the state in question. Other factors are the changing of one's military records to reflect the change in domicile and the making of plans and the taking of steps

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[52] *Id.* at 72.

[53] 4 Utah 2d 147, 289 P.2d 331 (1955).

[54] *Id.* at 333.

such as was done by the Army doctor in the *Percy* case toward employment after retirement or release from active duty. However, in *Volmer v. Volmer* the court rejected certain acts such as vehicle registration and the obtaining of a driver's license because of facts peculiar to the serviceman as well as the applicable Oregon statutes. The court did, however, accept the act of registering to vote almost in and of itself as sufficient to show intent to change domicile to Oregon.

The decision in *Ellis v. Southeast Const. Co.* suggests some additional action to be taken.[55] Plaintiff, an enlisted airman, brought an action for damages involving Arkansas real estate owned by him in an Arkansas Federal District Court, alleging for diversity jurisdiction that he was domiciled in Louisiana. This was an appeal from the District Court's dismissal. Plaintiff was born and reared in Saratoga, Hempstead County, Arkansas. He enlisted in the Air Force in 1939, and had served continuously in the Air Force at various places for nineteen years. He last declared Arkansas as his home on re-enlistment in 1945. Afterward, on two succeeding re-enlistments while stationed in Tampa, Florida, he declared Tampa as his home. Later, he was stationed in South Dakota and Kansas. He testified that he spent considerable effort to be transferred to Barksdale Field, near Shreveport. He chose that area because he felt it would be an ideal place for a permanent home and also to be near his wife's ailing father. Plaintiff testified as to his intention to retire in Shreveport, Louisiana on completion of twenty years service and to secure employment there. He and his wife further testified that they had considered Shreveport their home since arriving there in March 1956, but had not voted or paid poll tax anywhere. After commencement of this action, plaintiff purchased a Shreveport home. At the time of this action plaintiff still owned the real estate in Hempstead County, Arkansas. The Court of Appeals held that plaintiff had acquired a Louisiana domicile and reversed and remanded the case for trial. In so doing the court stated that:

> Generally speaking, in order [to] acquire a domicile of choice, the law requires the physical presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicile is instantaneous. . . . The fact that one is on military duty does not preclude him from establishing his residence where he is stationed. . . . The only permissible conclusion is that plaintiff, by choice, became a citizen of . . . Louisiana . . . in March, 1956.[56]

V. Conclusion

Most early American courts affirmatively recognized that servicemen could change domicile. Even those few early courts which carelessly

[55] 260 F.2d 280 (8th Cir. 1958).

[56] *Id.* at 281, 282, 284.

and incidentally used literal language indicating that servicemen could not change domicile did not so hold. They merely held that under the facts of the particular case, and in the light of conditions existing at that time, the facts did not show an intent to change domicile. Later courts carefully refrained from using the unfortunate literal language of a few early cases that servicemen cannot change domicile. Courts today consistently recognize that anyone, including a serviceman, can change domicile. The courts proceed to examine the facts of the case to determine whether there is any substantial evidence of an intention concurring with physical presence.

No American case has been found, early or recent, where a serviceman's claimed change in domicile has not been recognized because he was in the military, if there were acts on his part supporting to any substantial degree his claimed change. Even in those cases where the courts have been unable to discover any substantial evidence of intent to change, the courts have uniformly recognized that a change could have occurred readily if there had been sufficient evidence of intent.

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Student Comments

PROPOSED RESTRICTIONS ON POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY

I. General Law

A. Background

1. *History*

The law of future interests seems to have begun in the late thirteenth century, and to have been completed by the late sixteenth century when all presently known types of future interests were substantially defined.[1] Recognition was accorded rights of entry, possibilities of reverter, reversions, remainders, powers of appointment, springing and shifting uses, and executory devises.[2] This discussion is concerned primarily with only two of these interests: the right of entry for condition broken and the possibility of reverter.

The oldest form of future interest seems to be the right of entry,[3] which owes its existence to the liberality of the law at the time of its creation in giving effect to the "form of the gift," i.e., the donor's intention.[4] This interest achieved its greatest importance during the fourteenth and fifteenth centuries,[5] but it does not seem to have had the same qualities as the modern right of entry for condition broken.[6]

The origin of the determinable fee is somewhat uncertain, but there is a reference to such an estate in the Yearbooks of Edward IV in 1467.[7] Although Gray argued that the Statute Quia Emptores abolished the possibility of reverter,[8] this argument has not generally been accepted by either the authorities[9] or the cases[10] in America.

2. *Definition*

A right of entry for condition broken has been defined as "an interest reserved in a grantor (or a testator's estate) and is aptly

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[1]See 2 Powell, Real Property § 266 (1950).

[2]*Ibid.*

[3]*Ibid*; Bordwell, *The Common Law Scheme of Estates*, 18 Iowa L. Rev. 425 (1933).

[4]See 1 American Law of Property § 2.7 (Casner ed. 1952).

[5]See 2 Powell, *op. cit. supra* note 1, § 266.

[6]See Simes & Smith, Future Interests § 245 (2d ed. 1956) [hereinafter cited as Simes & Smith].

[7]*Id.* § 17.

[8]Gray, The Rule Against Perpetuities § 39 (4th ed. 1942).

[9]See Simes & Smith § 17.

[10]See, *e.g.*, Kelly v. Wilson, 204 Miss. 56, 36 So. 2d 817 (1948). For a list of cases see Simes & Smith § 283 n.22.

described by its name."[11] An example of this interest is shown by a conveyance or devise "to the A church on condition that the premises be used for no purpose other than church purposes, and upon breach of said condition the grantor or his heirs may repossess the said premises as of their former estate."[12] The operative facts in the creation of a right of entry are (1) a conveyance, (2) containing words by which a condition subsequent is created giving the grantor or his heirs an election to terminate the estate granted upon the happening of the contingency.[13]

It should be noted at this point that the concern of this article is only with rights of entry which are reserved after the conveyance of an estate in fee simple absolute. Such an interest differs from a remainder and an executory interest in that those interests are always created in a third person, while a right of entry is always reserved in the grantor; and it is distinguished from a possibility of reverter and an executory interest in that a right of entry requires an election to terminate the estate granted while the former interests operate automatically; and, lastly it is distinguished from a reversion in that a reversion arises after the conveyance of an estate less than fee simple, and operates automatically.[14]

A right of entry was descendible at common law, and generally it is both descendible and devisable in the United States today.[15] The great weight of authority in this country, however, is that such an interest, unless accompanied by a reversion, is inalienable, but it is releasable.[16]

Professors Leach and Tudor define a possibility of reverter (hereinafter frequently referred to as a reverter) as the "residual interest left in the grantor (or testator) when he has conveyed (or devised) a fee simple determinable, i.e., a fee simple that is to last only so long as certain stated conditions exist."[17] The classic example of a determinable fee is a conveyance or devise "to the A church in fee simple so long as the premises are used for church purposes."[18] This definition excludes the possibility of reverter which is created by the conveyance

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[11] LEACH & TUDOR, THE RULE AGAINST PERPETUITIES § 24.62 (1957). *But see* RESTATEMENT (SECOND), PROPERTY § 155 (1936), where such an interest has been termed a "power of termination" following the Hohfeldian terminology.

[12] LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 29 (1961) [hereinafter cited as LEACH & LOGAN].

[13] See SIMES & SMITH § 242.

[14] *Ibid.*

[15] *Id.* § 1903.

[16] *Id.* § 1862. *But see* MISS. CODE ANN. § 831 (1956) permitting alienation of any interest in property. A right of entry has been alienable in England for over 100 years. See SIMES & SMITH § 1862.

[17] LEACH & TUDOR, *op. cit. supra* note 11, § 24.62.

[18] LEACH & LOGAN 29.

of a fee simple conditional,[19] which interest was abolished by the Statute De Donis in 1285.[20] However, since this type reverter appears in only a very small minority of jurisdictions in this country it will be ignored in this discussion.[21] The reverter is identical with the executory interest in substance except that the former is created in the grantor and the latter in a third person.[22] The only factual distinction (i.e., as opposed to any differences in legal consequences) between the possibility of reverter and the right of entry is merely one of form[23] and as a consequence there is confusion between the two, some courts not recognizing a distinction at all.[24] Descendibility and devisability are qualities of a possibility of reverter as well as of a right of entry.[25] An inter vivos alienation of a reverter is generally prohibited in the absence of a statute, but there are quite a few jurisdictions which have such statutes.[26]

3. *The Rule Against Perpetuities*

The distinction between a reverter and a right of entry can be of primary importance,[27] but the concern of this article is the distinction made between both these forfeiture interests and executory interests.[28] The consequential difference is this: rights of entry and reverters are exempt from the Rule, while executory interests are not.[29] This means that a grantor may create substantially identical interests in a third person one of which is subject to no limitation, while the other must be limited so as to vest within a period of lives in being plus twenty-one years. For example, a conveyance to a school district "so long as the land shall be used for school purposes, but when the land shall cease to be used for such purposes, it is to revert to X" creates an executory interest in the third person, X, which is void under the Rule Against Perpetuities.[30] If, however, the grantor in this case had

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[19]See, *e.g.*, Burnett v. Snoddy, 199 S.C. 399, 19 S.E.2d 904 (1942).

[20]See SIMES & SMITH § 12.

[21]*Id.* § 281.

[22] *Id.* § 282.

[23]*Ibid.*

[24]See, *e.g.*, Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951).

[25]See SIMES & SMITH § 1860.

[26]*Id.* § 1860 n.80 which gives a list of the states on both sides of the question; see MISS. CODE ANN. § 831 (1956).

[27]See, *e.g.*, Jones v. Oklahoma City, 193 Okla. 637, 145 P.2d 971 (1943).

[28]Since the same distinction could also be made between these forfeiture interests and indestructible contingent remainders, the latter term will be included within the term "executory interests" for the purposes of this article.

[29]See 6 AMERICAN LAW OF PROPERTY § 24.62 (Casner ed. 1952).

[30]Jones v. Burns, 221 Miss. 833, 74 So. 2d 866 (1954), which represents the general treatment of a reverter attempted to be created in one other than the grantor; see LEACH & LOGAN 34-47.

first created the determinable fee in the school district and then had conveyed the reverter to X, X would then have a perfectly valid interest—at least in a large number of states which permit an inter vivos alienation or devise[31] of such an interest.

Is there a rational basis for this distinction? In 1955, an American court for the first time attempted to explain why the Rule Against Perpetuities did not apply to these interests.[32] But the reasoning of that court has been attacked as being based on two fallacies: "first, that all executory interests are contingent as to the person or persons to take and therefore cannot be released; second, that if a future interest can be released it does not violate the Rule Against Perpetuities."[33] Due to the similarity of these interests with executory interests, it is not thought that the exemption of the former from the Rule could be sustained as an original proposition.[34] It has been suggested, however, that "this objectionable feature [exemption from the Rule] is mitigated by the fact that . . . [possibilities of reverter and rights of entry] . . . can in their creation be reserved only to conveyors and cannot be limited to third parties."[35] In the light of the modern tendency as shown by the cases and authority discussed above, this statement would no longer seem entirely true. Further explanation of the exemption of these interests from the Rule has been attempted by contending that historically such interests antedated the Rule.[36] This has been attacked by Professor Leach on two grounds:[37] (1) contingent remainders were recognized long before the Rule Against Perpetuities and yet they are frequently subjected to the Rule,[38] and (2) English history and law apply the Rule to rights of entry[39] and maybe to possibilities of reverter.[40] Thus, the exemption of these interests from the Rule appears to have basis in neither logic nor history.

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[31]This may be done in Massachusetts by the creating will, provided the forfeiture interest is devised in a separate clause. See Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950).

[32]Proprietors of the Church in Brattle Square v. Grant, 69 Mass. 142 (1955).

[33]Cook, *Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities*, 15 TEMP. L. Q. 509, 517 (1941); *cf.* 6 AMERICAN LAW OF PROPERTY § 24.3 (Casner ed. 1952).

[34]See LEACH & LOGAN 40-42.

[35]Cook, *supra* note 33, at 516 n.46 quoting Dean Everett Fraser.

[36]See 6 AMERICAN LAW OF PROPERTY § 24.62 (Casner ed. 1952).

[37]ABA, REAL PROPERTY PROBATE AND TRUST LAW 20 (1960) [hereinafter cited as ABA (1960)].

[38]See SIMES & SMITH § 1237.

[39]See, *e.g.*, *In re* Trustees of Hollis Hospital, [1899] 2 Ch. 540. This rule was later adopted by statute. Law of Property Act of 1925, 15 Geo. 5, c.20, § 4(3).

[40] See Hopper v. Corporation of Liverpool, 88 Sol. J. 213 (Vice-Chancellor's Court of the County Palatine of Lancaster 1944). *Contra*, *In re* Chardon, [1928] 1 Ch. 464; *In re* Cooper's conveyance Trusts, [1956] 3 All E.R. 28. LEACH & TUDOR, *op. cit. supra*

4. *Desirability of Change in the Law*

Possibilities of reverter and rights of entry are used for a great variety of purposes. They serve as security devices, for securing the payment of money or the performance of services; as coercive devices for controlling conduct; as a method of regulating the use of conveyed land; and as devices for directing the course of property ownership.[41] There are other methods which could be used to accomplish the same purpose, such as covenants, easements, deed restrictions, trusts, executory interests, or powers of appointment,[42] but in spite of this, rights of entry and possibilities of reverter appear to be used with increasing frequency.[43]

The leading authorities have attacked possibilities of reverter and rights of entry for many reasons,[44] all of which seem to result from their unlimited duration. One such ground for objection is that these interests, being unrestrained, descend to the heirs of the grantor pyramidally until the condition is breached, at which time the difficulty and expense of locating all of the holders of the right of entry or reverter can be prohibitive.[45] Another reason is that such a restriction hinders alienation,[46] even though it is not a restraint on alienation;[47] that is to say, the defeasible nature of a fee will discourage both prospective purchasers and mortgagees.[48] Coupled with this idea is the objection that enforcement of forfeiture provisions when the character of the community has changed would only serve to lessen the value of the land without really being of any substantial benefit to the grantor since enforcement of the restriction will not restore the land to its original character.[49] Professor Leach, in addition to the above objections, also believes that the forfeiture provision is frequently held by the wrong

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note 11, at 150 n.5 suggest the possibility of reconciliation since *Hopper* involves realty and *Chardon* personalty.

[41]See Brake, *Fee Simple Defeasible*, 28 KY. L.J. 424 (1940), which gives a complete discussion of each purpose.

[42]*Ibid.*

[43]See LEACH & LOGAN 28. *But see* Dukemenier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 70 (1960), in which it is stated that in one year in one county of Kentucky, there were only six such forfeiture interests created out of 4656 wills and deeds.

[44]See LEGISLATIVE RESEARCH CENTER, UNIVERSITY OF MICH., CURRENT TRENDS IN STATE LEGISLATION 589 (1953-54) [hereinafter cited as CURRENT TRENDS]; Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940).

[45]See LEACH & LOGAN 45-46.

[46]See Goldstein, *supra* note 44, at 251.

[47]See generally SIMES & SMITH §§ 1107-71.

[48]See Goldstein, *supra* note 44, at 251.

[49]See, *e.g.*, Hurd v. Albert, 214 Cal. 15, 3 P.2d 545 (1931).

persons, i.e., heirs and devisees, instead of adjoining landowners.[50] A still further, and very practical, objection has been urged by the American Bar Association, namely, the increased burden of tracing titles caused by these unlimited interests.[51] Obviously, if these interests are exempt from the Rule Against Perpetuities, they may last forever, and if that is true, then the only way in which one can be certain that a particular piece of realty is not subject to such restriction is to trace the title back to its origin. The time is sure to come when this type title search will be virtually impossible—if not because of the state of the recorded deeds or encumbrances, then because of the relation of the lawyer's fee to the value of the land.

Rights of entry and possibilities of reverter have certain characteristics in common with restrictive covenants, the primary ones being: non-subjection to the Rule; ascertainment only by the written record, and not by use; negative limitation on the employment of land; and imposition by private act.[52] A discussion of restrictive covenants has been omitted from this article because of two important differences between them and possibilities of reverter and rights of entry: (1) violation of a covenant is a basis for damages only and not a forfeiture, and (2) restrictive covenants are subject to destruction (or virtual destruction by a merely nominal award of damages for the breach) when there has been a change in the conditions so as to make enforcement of the covenant unreasonable.[53]

With respect to any legislation restricting these interests, two basic policies of the law must be kept in mind.[54] The first is that land should be freely alienable; but to be freely alienable or marketable, the title must not only be clear but easily discoverable. The second policy is that owners should be able to impose such limitations as they desire in disposing of their own land. It has been said of this relation:

> Legislation, in order to resolve satisfactorily the problem created by the use of possibilities of reverter and rights of entry as conveyancing devices, must take several things into account. It must give effect to the policy of free alienability of land. To do this, it must aid in making titles marketable, and it must aid the title examiner in discovering the state of title. At the same time, it must protect the owners of land in their right to dispose of their land as they choose.[55]

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[50]See ABA (1960) 22.

[51]ABA, Real Property Probate and Trust Law 11 (1957) [hereinafter cited as ABA (1957)].

[52]*Ibid.*

[53]See Current Trends 648. See also Cook, *supra* note 33, at 510, who would also limit resulting trusts.

[54]See Current Trends 590.

[55]*Id.* at 592-93.

B. Methods of Restriction

1. *By Creating Instrument*

Of course, the most effective method of limiting the duration of possibilities of reverter and rights of entry within the bounds of the grantor's intention would be for the grantor or testator to incorporate such limitations into the instrument creating the interests. This method, although highly commendable, is no solution to the problem at hand because it would be too optimistic to assume that all landowners would voluntarily act with such wisdom and restraint.

2. *By Judicial Authority*

It has been suggested that if the issue of exemption of reverters and rights of entry from the Rule Against Perpetuities should be one of first impression in a particular jurisdiction, then the courts of that state should follow the English cases which hold these interests subject to the Rule.[56] This might be justified because "there is a conflict of authority within the Common-Law system, and, in the absence of precedent binding upon a particular court, there should be no hesitation in following the English cases where they are found to reach preferable results."[57]

Another method of limiting these restrictions has been adopted by California, and that is the treatment of these interests as restrictive covenants, subjecting them to the equitable rule of changed conditions.[58] In *Letteau v. Ellis* the court refused to enforce a forfeiture provision which had been breached, saying:

> We find it needless to follow appellants' arguments on the technical rules and distinctions made between conditions, covenants, and mere restrictions. . . . A principle of broad public policy has intervened to the extent that modern progress is deemed to necessitate a sacrifice of many former claimed individual rights. The only obstacle met has been the rule of property or as termed the disinclination to disturb vested property rights. To some extent this, too, has yielded in the sense that many rights formerly labelled as property rights by a process of academic relation are now considered merely personal and have been subjected to the common good.[59]

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[56]LEACH & TUDOR, THE RULE AGAINST PERPETUITIES § 24.62, at 157 (1957). Compare Jones v. Burns, 221 Miss. 833, 74 So. 2d 866 (1954) indicating that Mississippi is committed to the exemption. There seem to be many other cases to this effect.

[57]LEACH & TUDOR, *op. cit. supra* note 56, at 157.

[58]See, *e.g.*, Forman v. Hancock, 3 Cal. App. 2d 291, 39 P.2d 249 (Dist. Ct. App. 1934); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (Dist. Ct. App. 1932).

[59]10 P.2d at 497-98. See generally Annot. 4 A.L.R.2d 1111, 1116-17 (1949), for a complete discussion of the treatment of restrictive covenants, wherein it is said: ". . . courts of equity . . . grant or withhold injunctive relief depending upon the

This rule, although apparently settled in California, cannot be found substantiated by any other jurisdiction,[60] even though it has been recommended by several authorities.[61] Under the *Letteau v. Ellis* rule, a distinction might be made between rights of entry and reverters, since vitiation of the former leaves a fee simple absolute in the grantee, while a lesser estate would be left in the grantee if the possibility of reverter were avoided. That is to say, the implication of the *Letteau v. Ellis* rule as applied to a possibility of reverter would be the enlargement of the grantee's determinable fee into an estate in fee simple absolute, and this result might be considered a basis for the non-application of that rule. However, it has been concluded that this distinction is an illusory technicality because the estate in the grantee in both instances is identical in practical operation.[62]

Even though the general theory of the law of future interests is contrary to *Letteau v. Ellis*, i.e., that reverters and rights of entry are not subject to destruction because of a change in the conditions which prompted their creation,[63] there are constructional devices which courts apply so as to reach the same results, and the factor of changed conditions seems to play a large part in the application of these constructional devices.[64] The first of these "rules" is the preference of a right of entry to a possibility of reverter whenever the language of the instrument is ambiguous. The key to the preference is the fact that a right of entry may be held to be waived, or delayed too long in assertion for enforcement,[65] whereas this is not true of a reverter because of its automatic operation. The second device used is that of finding that particular language creates a covenant and not a condition.[66] And lastly is the device of finding the condition satisfied by compliance for only a reasonable time.[67] Related to this last device, but less startling,

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accomplishment of an equitable result in the light of all the circumstances surrounding the particular case, and grant or withhold affirmative relief depending upon whether the restrictive covenant remains of substantial benefit to the dominant estate or whether its purpose has been defeated by a radical change in the character of the neighborhood."

[60] *But see* Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918) (dictum).

[61] Ferrier, *Determinable Fees and Fees upon Condition Subsequent in California*, 24 CALIF. L. REV. 512 (1933); Goldstein, *supra* note 44.

[62] See Goldstein, *supra* note 44, at 271-72; *cf.* RESTATEMENT, PROPERTY §§ 44-58 (1936), where both interests are discussed under one heading: Fee Simple Defeasible.

[63] See SIMES & SMITH § 1992.

[64] *Id.* § 1993.

[65] See, *e.g.*, Sanford v. Sims, 192 Va. 644, 66 S.E.2d 495 (1951). See also Twin States Realty Co. v. Kilpatrick, 199 Miss. 545, 26 So. 2d 356 (1946). *But see* Yazoo & M.V.R.R. v. Lakeview Traction Co., 100 Miss. 281, 56 So. 393 (1911).

[66] See, *e.g.*, Storke v. Pennsylvania Mut. Life Ins. Co., 390 Ill. 619, 61 N.E.2d 552 (1945). See also Soria v. Harrison County, 96 Miss. 109, 50 So. 443 (1909).

[67] See J. M. Carey & Bros. v. City of Casper, 66 Wyo. 437, 213 P.2d 263 (1950), where the court held that a condition unlimited as to time was satisfied by performance for a term of years.

is the method frequently used by the courts of finding that even though there is a valid condition subsequent, there has been no breach.[68]

Without delving into the question of the legal propriety or constitutionality of these various methods of limiting possibilities of reverter and rights of entry by judicial authority, it is obvious that these will provide no present solution to the problem. One cannot draft instruments in the tenuous hope that the courts will deviate from the general rule or abrogate existing law sometime in the future. And even if the courts in this state were to adopt the view of *Letteau v. Ellis* (which is very doubtful),[69] this would not aid the conveyancer who has to trace the titles, that is, there would be no way short of litigation for one to ascertain whether conditions were changed to such an extent as to avoid the forfeiture interests.

3. *By Statutory Authority*

a. *"Unlimited Time" and "Substantial Benefit" Statutes*

Statutes of this nature appear to have been enacted relatively early in the history of this country and one of the earliest was the Massachusetts act passed in 1887. This act limits all "conditions or restrictions, unlimited as to time" to thirty years "after the date of the deed or other instrument . . . creating them, except in the cases of gifts or devises for public, charitable or religious purposes."[70] By its terms the statute operates only prospectively, i.e., on restrictions or conditions created after 1887. The statute has been held to apply to an unlimited restrictive covenant created in 1899 just as if the instrument itself expressly provided the thirty year limitation.[71] And the phrase "unlimited as to time" has been construed to mean that the contingency must not be one which is uncertain to occur, or the restriction will be limited to the thirty year period by the act.[72] Apparently, all that is necessary to circumvent this type statute is to specify *any* fixed time for the duration of the restriction, and for that reason this statute has been called the "most ineffective."[73]

There are other statutes, similar to the Massachusetts enactment,

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[68]See SIMES & SMITH § 256 citing Buck v. Macon, 85 Miss. 580, 37 So. 460 (1904).

[69]See Hemphill v. Mississippi State Highway Comm'n, 145 So. 2d 455 (Miss. 1962), where the court held that shifting executory interests may be compensated in eminent domain proceedings.

[70]MASS. ANN. LAWS ch. 184, § 23 (1955).

[71]See, *e.g.*, Riverbank Improvement Co. v. Bancroft, 209 Mass. 217, 95 N.E. 216 (1911).

[72]See Flynn v. Caplan, 234 Mass. 516, 126 N.E. 776 (1920), where "The restrictions above set forth shall continue in force so long as such roadwalk and walk shall be maintained by said City of Boston," was held "unlimited as to time."

[73]Goldstein, *supra* note 44, at 254-55. Note also that none of the statutes discussed in this subsection appear to apply to possibilities of reverter.

but of far greater importance, which provide that when any conditions annexed to a deed or grant of land "are nominal" and of "no actual and substantial benefit" to the grantor they are void and unenforceable.[74] These "substantial benefit" statutes seem, from a literal viewpoint, to apply to presently existing interests or interests created before enactment of the statute, but this view cannot be sustained with any case authority because the statutes have such an ancient origin that no interests can be found in the cases which arose prior to the enactment of the statutes.[75] The recommendation of the New York Law Review Commission,[76] however, was that that portion of the New York statute should apply only prospectively in that state's recently adopted act.

In *Smith v. Barrie*, it was decided that a condition forbidding the sale of liquor on the premises conveyed was not made nominal because liquor was sold in the neighborhood or because of lack of proof of consumption by the grantor's servants.[77] However, where restrictions imposed on land were for the benefit of lands retained by the grantors, the heirs of the grantors who conveyed all of the land within the area subject to the restrictions could not enforce the restrictions against the grantees.[78] These two cases are mentioned merely for the purpose of demonstrating in a general way the application of the "substantial benefit" type statutes. There is a surprising paucity of decision under these statutes,[79] and they have been criticized because "it is a question of fact whether the condition is substantial or nominal, and a breach by the owner or purchaser always incurs the danger of litigation."[80] This element renders such statutes ineffective for the purpose of facilitating a title search, and thereby making titles marketable without resort to the courts.

b. *Period-in-Gross Statutes*

As previously discussed, some authorities have not thought it wise to apply the Rule Against Perpetuities to possibilities of reverter and

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[74] ARIZ. REV. STAT. ANN. § 33-436 (1956); MICH. STAT. ANN. § 26.46 (1957); WIS. STAT. ANN. § 230.46 (1957). The above three statutes are identical, while MINN. STAT. ANN. § 500.20(1) (1947) is substantially similar; and N.Y. REAL PROP. LAW §§ 346(1), 347(3) (Supp. 1962) would seem to grant relief only to protect "a substantial interest in enforcement of the restriction."

[75] The Wisconsin act, enacted in 1849, appears to be the oldest.

[76] See N.Y. REAL PROP. LAW § 346 (Supp. 1962).

[77] 56 Mich. 314, 22 N.W. 816 (1885).

[78] O'Malley v. Central Methodist Church, 67 Ariz. 245, 194 P.2d 444 (1948).

[79] See SIMES & SMITH § 1994 nn.42-43.

[80] Fraser, *Future Interests in Property in Minnesota*, 3 MINN. L. REV. 320, 338 (1919).

rights of entry, but this general approach to the problem has been given the widest support in the form of "period-in-gross" statutes.[81] An example of this type statute is as follows:

> A fee simple determinable in land or a fee simple in land subject to a right of entry for condition broken shall become a fee simple absolute if the specified contingency does not occur within thirty years from the date when such fee simple determinable or such fee simple subject to a right of entry becomes possessory. If such contingency occurs within said thirty years the succeeding interest, which may be an interest in a person other than the person creating the interest or his heirs, shall become possessory or the right of entry exercisable notwithstanding the Rule Against Perpetuities.[82]

The time limit of thirty years was chosen by the Massachusetts legislature because that was the period specified in the "unlimited time" statute previously mentioned, and because that was the period specified in the similar Minnesota statute which had been successful since 1937.[83] The American Bar Association also recommends a thirty year time limit because it is said to be the maximum duration of most ordinary mortgages, and the period of one generation (which thereby leaves the next generation's interests unencumbered).[84]

The phrase in the second sentence of the statute, "which may be an interest in a person other than the person creating the interest or his heirs," was used to avoid a special situation.[85] If O conveyed to P "so long as the property is used for church purposes, and after it shall cease to be so used, then to T," then under most decisions T's interest is void under the Rule. But O still has a possibility of reverter which will come into possession when the property ceases to be so used.[86] Since possibilities of reverter and rights of entry may be alienated inter

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[81]See CONN. GEN. STAT. REV. § 45-97 (1958); ILL. ANN. STAT. ch. 30, §§ 37 (b) - (h) (Supp. 1962); KY. REV. STAT. § 381.219 (Supp. 1962); ME. REV. STAT. ch. 160, § 29 (Supp. 1961); MASS. ANN. LAWS ch. 184A, § 3 (Supp. 1961); MINN. STAT. ANN. § 500.20 (1957); NEB. REV. STAT. §§ 76-299-2, 105 (Supp. 1959); N.Y. REAL PROP. LAW § 345 (Supp. 1962); R.I. GEN. LAWS ANN. § 34-4-19 (1956). The Kentucky statute is unique in that it converts possibilities of reverter into rights of entry. For full explanation of that act see Dukemenier, *supra* note 43.

[82]MASS. ANN. LAWS ch. 184A, § 3 (Supp. 1961). This statute had provided for an alternative period of the Rule Against Perpetuities, but was amended in 1961. For a discussion of the entire act see Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349 (1954).

[83]See LEACH & TUDOR, *op. cit. supra* note 56, at 212.

[84]ABA (1957) 79. Of the nine states having such a statute, only Rhode Island and Illinois have a period other than thirty years, *viz.*, twenty and forty, respectively—Illinois apparently having found a fifty year period unfeasible. See note 81 *supra*.

[85]See Leach, *supra* note 82, at 1364.

[86]See, *e.g.*, Institution for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923); Jones v. Burns, 221 Miss. 833, 74 So. 2d 866 (1954).

vivos in a number of states,[87] or devised to a third person in a separate clause of the creating will,[88] and since the statute now restricts these interests to thirty years, then it is argued that there is "no reason to discriminate against interests in third persons."[89] Thus, under the statute P would have an estate in fee simple absolute if thirty years had expired, instead of there being an existing possibility of reverter in O and/or his heirs; and T would, of course, have a valid possibility of reverter for the thirty year period.

Period-in-gross statutes usually make exceptions based on the public policy of the particular state, some of which are: "a grant from the state . . . gift or devise for public, charitable, religious or educational purposes . . . any lease . . . or any easement, right of way, mortgage, or trust, or any communication, transmission or transportation lines, or any public highway, right to take minerals, or charge for support during the life of a person or persons."[90]

The advantage of the remedy afforded by a period-in-gross statute is simplicity and ease of application, plus the fact that it has the requisite certainty of expiration which is required to aid the conveyancer in determining the marketability of the title he is tracing.[91] It might be argued, however, that an absolute avoidance of these interests could work a hardship on a grantor, who still retained a substantial benefit, by the strict enforcement of the restrictions after the period for their duration had expired. The answer that "few, if any, restrictions would serve a useful purpose after that time" (thirty years)[92] seems, at first glance, to overlook a more equitable treatment.

c. *Equitable Statutes*

An equitable statute is one which abolishes the forfeiture aspect of a condition subsequent after the specified period in gross (or period of the Rule Against Perpetuities), but still enforces the "beneficial nature of the restriction . . . so long as circumstances justify."[93] This type statute was enacted in Florida:

> . . . upon the expiration of such period of twenty-one years, the reverter or forfeiture provisions shall become null, void and unenforcible.[94]

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[87]See MISS. CODE ANN. § 831 (1956).

[88]See Brown v. Independent Baptist Church, 325 Mass. 645, 91 N.E.2d 922 (1950).

[89]Leach, *supra* note 82, at 1364.

[90]ABA, LEGISLATORS' HANDBOOK ON PERPETUITIES 12 (1958), quoting the Uniform Act Relating to Reverter of Realty. *But see* ABA (1957) 83 recommending that no exceptions be created in favor of public or charitable gifts.

[91]See ABA (1957) 14.

[92]*Id.* at 15.

[93]Cook, *Rights of Entry, Possibilities of Reverter, Resulting Trusts and the Rule Against Perpetuities*, 15 TEMP. L.Q. 509, 525 (1941).

[94]FLA. STAT. ANN. § 689.18(4) (Supp. 1961).

> This section shall not terminate the restrictions placed upon said real estate, contained in . . . reverter or forfeiture clauses, and all said restrictions may be enforced and violations thereof restrained by a court of competent jurisdiction . . . .[95]

This apparent equitable treatment is open to the same objection as the "substantial benefit" statutes—that "the period of usefulness is a matter of fact which can only be established by protracted and expensive litigation and, where continued usefulness is established, dead-hand control can be retained indefinitely."[96]

d. *The Rule Against Perpetuities*

If the exemption of possibilities of reverter and rights of entry from the Rule at common law is the cause of the problem, why not simply subject these interests to the Rule? This suggestion has met with the following criticism:

> 'Lives in being' have no functional relation to the proper duration of land use restrictions. The common law perpetuity period evolved naturally as a period covering ordinary dispositions of family wealth thought reasonable. From the standpoint of certainty of land titles, it is preferable to fix the maximum duration by a period of years, after which it is certain from the record alone that the right of entry is void.[97]

It is supposed that what is meant by the objection that the Rule "has no functional relation" to these interests is the idea that a contingent conveyance to a third person (a shifting executory interest) is to be distinguished from a retention of an interest in the grantor (a possibility of reverter or a right of entry). This seems to be the same as saying that rights of entry and reverters are vested interests,[98] and therefore a requirement that the contingency occur within the period of lives in being (plus twenty-one years) is meaningless. This would be a valid argument if rights of entry and possibilities of reverter were not, in fact, contingent interests. For example, a springing executory interest may be subjected to a period in gross of twenty-one years, and this is true even though there is nothing contingent at all in the form of the gift.[99] However, it may readily be seen that reverters and rights of entry have much more in common with a shifting executory interest than they do with this type springing executory interest. That

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[95]FLA. STAT. ANN. § 689.18 (7) (Supp. 1961).

[96]ABA (1957) 77.

[97]Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 KY. L.J. 3, 76 (1960).

[98]See SIMES & SMITH §§ 1238-39.

[99]A conveyance by O to "P for life, and twenty-five years after the death of P, then to T" is a springing executory interest that is void under the Rule. See SIMES & SMITH § 223.

is to say, as a practical matter, possibilities of reverter, rights of entry and shifting executory interests all divest the preceding estate on the happening of a particular event. They are all contingent interests in point of fact.[100] Why then should a right of entry or possibility of reverter be treated any differently than an executory interest? The answer that may have been a good one at one time—that the former interests may only be created in the grantor, and that the grantor's alienation of them is restricted—would no longer seem to be true.[101] It is submitted that the first objection to applying the Rule to reverters and rights of entry is based on an inaccurate and impractical view. The Rule has as much "functional relation" to these interests as it does to any other interest to which it has been applied.

The next objection is really a preference of another method of limitation—a period in gross—which would more readily facilitate ascertainment of the state of titles. Obviously, a period in gross in this respect is preferable to the period of the Rule, and the temptation to choose the former for this reason apparently was too great for the states adopting such legislation.[102] It is submitted, however, that even though it might be advantageous to adopt a period in gross for the purposes of marketability of titles, the result which such a statute produces is inconsistent with the treatment of substantially identical interests. As already discussed, rights of entry, possibilities of reverter, and executory interests are almost identical contingent interests, the only real factual distinction being that the first two interests may be created only in the grantor while the last are created in third persons.[103]

> . . . [*The possibility of reverter*] . . . *is distinguished from the right of entry for breach of condition factually only by the use of different language in the instrument of conveyance*, . . . [It] . . . differs from the . . . executory interest in that it arises only in the transferor or his heirs, whereas such other interests are always created in persons other than the transferor. Thus, where a person owning land in fee simple absolute conveys an estate in fee simple determinable and also provides that upon the expiration of such estate the land shall pass to some third person, the interest of such third person would be called an executory interest. *So far as substance is concerned, the interest is identical with the possibility of reverter which would have remained in the grantor had he conveyed only the determinable fee.* (Emphasis added.)[104]

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[100]See SIMES & SMITH §§ 1238-39; *cf.* Dukemenier, *supra* note 97, at 69-81, stating that the reason Kentucky converted reverters into rights of entry was because of their similarity in operation but divergent legal consequences.

[101]See notes 14, 15, 24, 25 *supra* and accompanying text.

[102]As a matter of fact no statute can be found in this country which presently applies the Rule Against Perpetuities to these forfeiture interests. *But see* notes 39-40, 82 *supra* and accompanying text.

[103]See SIMES & SMITH § 282.

[104]*Ibid.*

It therefore seems anomalous to subject interests identical in substance to separate restrictions in view of the present liberality of some jurisdictions in allowing alienation and devises to be made of reverters and rights of entry, as well as executory interests. This is precisely the same argument used for not exempting reverters and rights of entry from the Rule.[105] But, is not limiting them to a period other than the Rule Against Perpetuities subject to precisely the same objection? A period-in-gross statute, such as in Massachusetts and Kentucky, providing that reverter and rights of entry "may be created in a person other than the grantor" seems even more objectionable. How will the courts be able to determine whether to apply the Rule or the period in gross, if all such interests may be created in third persons, and the only difference between such interests, as indicated above, is in the form of the creating language which may be wholly confusing? It is submitted that the courts will be more likely to apply whichever rule seems to yield a just result in the particular circumstances. But once this is done, how will a period in gross serve to make the job of tracing titles any less arduous and uncertain?

Another factor that makes the period-in-gross statute appealing is that interests will not be avoided because of the *possibility* that they might vest beyond the thirty year period. Thus the statute would treat such interests similarly to the "wait and see" doctrine that applies to contingent remainders, and which has been adopted by some states as applying to certain executory interests.[106] For example, a common law conveyance by O to A for life, and then remainder to A's unborn son if he reaches twenty-five, creates a valid contingent remainder in A's son and we wait to see first whether the son will be born and then whether he will reach the prescribed age. If the son does this his fee simple absolute is vested in interest and certain to vest in possession on the death of A. However, if A's son had an executory interest (for example, if there was a gap in the above conveyance between the life estate and the gift over, or, if A had an estate in fee), it would be void for remoteness. The period-in-gross statute validates possibilities of reverter and rights of entry "notwithstanding the Rule Against Perpetuities," for the duration of the particular period. This again would appear to be subjecting substantially identical interests to different rules.

It is submitted that the better solution to the problem of limiting possibilities of reverter and rights of entry is to subject them to the Rule Against Perpetuities. If, at some future time, the legislature should see fit to modify the Rule Against Perpetuities, then that would be the time to consider limiting *all* contingent future interests to a period in gross, or making whatever other modification is then desired.

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[105]Compare Dukemenier, *supra* note 97.

[106]See LEACH & TUDOR, *op. cit. supra* note 56, at 218.

Anything short of this, in the opinion of this author, would merely introduce additional inconsistency into this area of the law, without serving any useful purpose.

4. *Retroactivity*

A statute which would only limit possibilities of reverter and rights of entry which are created after the enactment of the statute is obviously a solution to merely one-half the problem. If the desirability of limiting these interests is conceded, then one must consider a method by which existing rights may also be limited. Anything less than this will do nothing towards alleviation of the present uncertainty of title transactions.

The most obvious solution to this problem is to make such a statute retroactive,[107] i.e., one that would apply to existing rights at the time of the enactment of the statute which have not vested in possession, or to which the immediate right to possession has not accrued, but such a solution runs afoul of constitutional protection. It has been observed that the courts have treated statutes dealing with property interests differently on a whole than they have statutes dealing with the *use* of land:

> The conservatism of the courts when passing upon the constitutionality of legislation which has an adverse effect upon static interest in property is in remarkable contrast to the liberality of the courts when passing upon the constitutionality of legislation restricting the use of land. Since Euclid v. Ambler Realty Co.[108] the contemplated use of property, even when the use is not harmful in itself or immoral, is subject to restriction in the public interest. . . . One finds in . . . [the former type cases] . . . an inclination to concentrate on the private property aspects with little or no attempt to balance private and public interests.[109]

Such retroactive legislation might be interpreted as impairing the obligations of contracts,[110] or as taking property without due process of law,[111] the latter of which constitutional provisions under the Fourteenth Amendment, has been the "favored resort against legislative

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[107]See generally SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND (1953) [hereinafter cited as SCURLOCK], for an excellent discussion of this entire problem.

[108]272 U.S. 365 (1926).

[109]SCURLOCK 8.

[110]U.S. CONST. art. I, § 10(1). "[I]t is now established beyond question that a conveyance of land is within [such] protection. . . ." ABA (1957) 79 n.27. However, whether the retention of a reverter or a right of entry constitutes a contract might be questioned.

[111]U.S. CONST. amend. V, XIV; MISS. CONST. art 3, § 14.

excesses" in this regard.[112] But there is scant case authority on the precise question being considered here, although the text authorities appear divided (some commentators having assumed the unconstitutionality of such legislation,[113] while others have been more hesitant).[114] Another authority believes a period-in-gross statute constitutional if applied to existing interests, provided the full period during which the contingency might occur was also allowed after enactment.[115] Professor Leach contends that such statutes could be made retroactive, "if there were a legislative declaration that these interests constitute a threat to the tax-basis and tend to deprive the community of the value of its one basic resource—land."[116]

There are only two cases which can be found that decide the constitutionality of statutes limiting existing possibilities of reverter and rights of entry: *Biltmore Village v. Royal*,[117] and *Trustees of Schools v. Batdorff*,[118] the former holding the statute unconstitutional, with the latter reaching the opposite result.

The *Biltmore* case held that the Florida statute[119] unconstitutionally impaired the obligation of contracts in that it rendered "null, void and unenforceable" all reverters or forfeiture provisions "now in force," twenty-one years from the date of the creating instrument. The court held ineffective a clause in the statute[120] which permitted a year from the date of enactment in which the holder of the reverter or forfeiture interest could institute suit.

> The trouble with such a saving clause is that it arbitrarily cuts off the right in one year unless suit is brought to enforce it. Such a saving provision affords no remedy to those situated like appellant, where breach of the covenant has not accrued, so as to actuate the enforcement of the right of reverter.[121]

The Illinois statute contained provisions substantially identical with the Florida statute, except that the period was fifty years,[122] but the Illinois court held that such a statute neither impaired the obligation of contracts, nor deprived persons of property without due process.

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[112]SCURLOCK 12. For a list of "due process" cases see ABA (1957) 80 n.28.

[113]See KALES, ESTATES, FUTURE INTERESTS § 302 (2d ed. 1920); Ferrier, *supra* note 61.

[114]See CURRENT TRENDS 625.

[115]SCURLOCK 247.

[116]ABA (1960) 23.

[117]71 So. 2d 727 (Fla. 1954), 41 A.L.R.2d 1380 (1955), 55 COLUM. L. REV. 235 (1954).

[118]6 Ill. 2d 486, 130 N.E.2d 111 (1955), 54 MICH. L. REV. 863 (1956).

[119]FLA. STAT. ANN. § 689.18 (Supp. 1961). See also Comment, 39 NEB. L. REV. 757 (1960), which seems to believe the Nebraska Reverter Act unconstitutional.

[120]FLA. STAT. ANN. § 689.18 (6) (Supp. 1961).

[121]71 So. 2d at 729.

[122]ILL. ANN. STAT. ch. 30, §§ 37 (e), (f) (Supp. 1962), which was later amended to forty years.

The court decided that the statute reflected the legislature's "appraisal of the actual economic significance of these interests, weighed against the inconvenience and expense caused by their continued existence for unlimited periods of time without regard to altered circumstances," and that the statute was a reasonable remedy of this situation.

The fact that reverters and rights of entry in Illinois were incapable of alienation, devise or partition was relied on by the court in determining whether to give these property rights constitutional protection. The court also relied on prior Illinois cases which transferred the interest left in the dedicator of property for street use to the adjoining tract owners. It is of some interest to note that these cases referred to the interest held by the dedicator as a "possibility of reverter,"[123] while an earlier Illinois case, *Helm v. Webster*,[124] which involved an express possibility of reverter in the dedicator, held that such a statute could not constitutionally apply. Needless to say, the *Helm* case is not mentioned by the court in *Batdorff*. Certainly, it would seem that there should be a distinction made, with regard to retroactive legislation, between an interest held by a dedicator who has been compensated for a fee simple absolute, and an interest, however remotely contingent, held by a grantor who has been compensated only for that estate which he transferred, i.e., something less than a fee simple absolute.

It is submitted that the result obtained in Illinois is probably due to a situation peculiar to that state, but even if it were not, a comparison of Illinois law with the law of Mississippi renders the strong impression that Mississippi would not follow the lead of the *Batdorff* decision. There are, however, other methods of accomplishing a similar result than by retroactive legislation.

One of these methods would be to provide a short statute of limitations during which time the right to possession of the property must be asserted upon breach of the condition.[125] Such provision would, however, appear to be efficacious only in those states having relatively long periods required for normal adverse possession,[126] and therefore not of much use in Mississippi.[127]

The American Bar Association has pointed out the desirability of avoiding the constitutional issue in any recommended legislation

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[123]See, *e.g.*, People *ex rel.* Franchere v. City of Chicago, 321 Ill. 466, 152 N.E. 141 (1926).

[124]85 Ill. 116 (1877).

[125]See LEACH & LOGAN 77-78.

[126]See ILL. ANN. STAT. ch. 83, § 1(a)-(b) (1956), which provides seven years adverse possession of these interests, while the normal statutory period is twenty years, ILL. STAT. ANN. ch. 83, § 1 (1956).

[127]See MISS. CODE ANN. §§ 709-11 (1956), providing a ten year normal period for adverse possession.

if there are any other practical alternatives.[128] A practical alternative in this situation is to be found in the so-called marketable title acts, or similar statutes applying only to reverters and rights of entry. The usual marketable title act provides:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by himself and his immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this act, instruments which have been re-recorded less than twenty-two years, and any encumbrances of record not barred by the statute of limitations.[129]

It is felt that statutes of this sort, besides clearing record titles from encumbrances, conditions and clouds of ancient provisions of dubious validity, will also serve to extinguish numerous such interests which will not be re-recorded because of the dilatoriness of human nature.[130]

Is such an act constitutional? It would seem that the provision allowing preservation of the interest by re-recording within a certain time should remove any constitutional question.[131] It is pointed out that marketable title acts require merely an assertion of the continued existence of the interest, as opposed to the alleged saving provision in retroactive legislation allowing *suit* to be brought within a certain period after enactment of the statute.[132] It should also be observed that these marketable title acts do *not* give protection to claimants of title when another is in hostile possession, and thus are to be distinguished from such other acts, which have been held unconstitutional.[133] The key to the distinction is that marketable title acts generally protect one

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[128]ABA (1957) 82.

[129]NEB. REV. STAT. § 76-288 (1959). Compare MICH. STAT. ANN. § 26.1271 (1953) which requires only a negative showing of no one in adverse possession. See also Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951).

[130]See Annot., 71 A.L.R.2d 846 (1960).

[131]See SCURLOCK 82-84; Dukemenier, *supra* note 97.

[132]See, *e.g.*, Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957), which distinguishes the *Biltmore* case on this ground.

[133]See Munison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949), holding KAN. GEN. STAT. ANN. § 67-612 (Supp. 1959) unconstitutional. That statute provided that when a plat of town and deed executed by person making the plat had been recorded twenty-five years prior to the statute, then the deed was conclusively presumed to convey perfect title, unless action was brought within a year of enactment of the statute.

in possession, while the other type statutes abrogate the rights of the possessor.[134]

The constitutionality of marketable title acts also seems settled when compared with several analogous statutes which have been upheld. For instance, retroactive recording statutes are almost universally upheld,[135] and zoning acts, which encroach upon rights that might otherwise have been exercised, are similarly held valid.[136]

The constitutional test that must be met is whether ". . . sufficient public interest is served by requiring the recording of the simple preserving notices within the prescribed period of time in order that thereby title searches may be shortened and simplified, thus saving expense, avoiding delay, and making land more freely alienable, to justify the destruction of aged interests if no such preserving notices are recorded."[137]

Similar to the marketable title acts are statutes which pertain only to possibilities of reverter and rights of entry, but which are different in that they absolutely extinguish the interests if not re-recorded, and pertain only to forfeiture interests created before the act, i.e., they do not require re-recording every thirty years.[138] Massachusetts furnishes an example of this type statute:

> No proceeding based upon any right of entry for condition broken or possibility of reverter . . . created before . . . [the effective date of this act] . . . shall be maintained . . . [so many years after enactment] . . . unless . . . [before that time] . . . (a) the condition has been broken or the reverter has occurred, and . . . persons having the right of entry or reverter shall have taken possession of the land . . . , or (b) a person or persons having the right of entry, or who would have it if the condition were broken, or who would be entitled if the reverter occurred . . . shall . . . have filed in the registry of deeds . . . a statement . . . describing the land and the nature of the right and the deed or other instrument creating it . . . .[139]

It would seem that the same result should obtain with regard

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[134]See Neal v. Teat, 240 Miss. 35, 126 So. 2d 124 (1961), quoting Dingey v. Paxton, 60 Miss. 1038, 1054 (1883): ". . . there is a wide distinction between that legislation which requires one having a mere right to sue, to preserve the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought." See generally Annot., 7 A.L.R.2d 1366 (1949).

[135]See SCURLOCK 73 citing Jackson *ex dem.* Hart v. Lampshire, 3 Pet. (8 U.S.) 280 (1830), as the leading case to this effect.

[136]See Aigler, *supra* note 129, at 196 citing as a striking example, City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941).

[137]Aigler, *supra* note 129, at 198.

[138]See Dukemenier, *supra* note 97.

[139]MASS. ANN. LAWS ch. 260, § 31A (Supp. 1961).

to the constitutionality of this type statute, as with the marketable title acts.[140]

II. Suggested Legislation for Mississippi

Mississippi appears to follow the general rules, first discussed, which are applicable to the creation and operation of possibilities of reverter and rights of entry, with only a few exceptions. One of these exceptions is statutory, and provides that "any interest in or claim to land may be conveyed to vest immediately or in the future . . . . ,"[141] and one may "devise all the estate, right, title and interest in possession, reversion or remainders" which he has.[142] Another apparent exception is that in Mississippi a grantor or testator would seem to be able to create a determinable fee in himself.[143]

The same objections voiced in regard to a period-in-gross statute would apply to an even stronger degree in Mississippi because of the liberality given to the alienation of all types of future interests in this state under Section 831 of the Code.[144] Even if a period-in-gross statute were enacted in Mississippi, its unconstitutionality as to retroactive application can be of very little doubt.

The only case that can be found to date which upholds such an act is the *Batdorff* decision, and it is submitted that germane Illinois law is sufficiently different from the law in Mississippi as to justify the conclusion that an opposite result would be reached in this state. For example, as previously mentioned, the *Batdorff* case relied on the peculiar application of the prior Illinois decisions of the term "possibility of reverter." There is no such situation in this state. Possibilities of reverter and rights of entry are not alienable nor devisable in Illinois,[145] as compared with the complete freedom accorded the alienability of these interests in Mississippi. Besides these distinctions between Illinois and Mississippi, this state seems to treat future interests in general, and especially contingent future interests, as a more sub-

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[140]See Dukemenier, *supra* note 97.

[141]Miss Code Ann. § 831 (1956); see Hamilton v. City of Jackson, 157 Miss. 284, 127 So. 302 (1930), where the court said: "It will not be doubted . . . that under the statute every conceivable interest in, or claim to real estate, whether present or future, vested or contingent, and however acquired, may be disposed by deed or will."

[142]Miss. Code Ann. § 657 (1956).

[143]See Shurley v. Aaron, 224 Miss. 490, 80 So. 2d 61 (1955), 27 Miss. L.J. 73, which article contends the interest in the grantee is a void special power of appointment; *cf.* Walker v. Marcellus & Otisco Ry., 226 N.Y. 347, 123 N.E. 736 (1919).

[144]See *supra* pp. 14-18.

[145]See Comment, 43 Ill. L. Rev. 90, 99-101 (1948), which says that the provision of the Illinois Reverter Act making these interests inalienable and non-devisable is merely declaratory of the case law of that state.

stantial property right than do the majority of other jurisdictions. The general rule is that owners of possibilities of reverter and rights of entry are not due compensation when the property is taken in eminent domain proceedings,[146] but a recent Mississippi decision appears to adopt a contrary rule.[147] This case analyzes the nature of a future interest in Mississippi, concluding that "a future interest is property that now exists," and this conclusion seems to hold true in this state regardless of the contingent nature of the interest. Because of this attitude towards contingent future interests, it would appear best to avoid the constitutional issue concerning retroactive legislation.

Perhaps it should be observed here that any constitutional objection to the retroactive application of a period-in-gross statute applies equally as well to retroactively applying the Rule Against Perpetuities. There is also a further complication surrounding the application of the Rule, and that is the utter confusion concerning Section 838 of the Code. On its face, this statute would appear to have reference only to fee tail estates, but the Mississippi court has at various times called it "our statutory Rule Against Perpetuities," and has so applied it.[148] If the analysis by Custy and Brand is correct—that the statute applies only when there is a gift over of realty after a succession of donees, and the common law rule applies at all other times[149]—then the common law Rule would seem to apply to the vast majority of instances involving possibilities of reverter and rights of entry. Of course, the best solution to this problem would be for the legislature to follow the suggestion contained in this article:

> As a matter of legislative policy and consistent with the present expressed State objective of attracting capital and industry to Mississippi as well as permitting its citizens to enjoy greater control over their real property, the Legislature should amend Section 838 by deleting that portion in controversy.[150]

In conclusion, it is submitted that the wisest course for this state to follow in adopting legislation designed to restrict possibilities of reverter and rights of entry would be to enact: (1) a statute rendering void all possibilities of reverter and rights of entry created in the future which are of no substantial benefit to the grantor at the time of their creation; (2) a statute making the Rule Against Perpetuities

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[146]See ORGEL, VALUATIONS UNDER LAW OF EMINENT DOMAIN § 117 (1936).

[147]See Hemphill v. Mississippi State Highway Comm'n, 145 So. 2d 455 (Miss. 1962).

[148]See Custy & Brand, *Future Interests—The Mississippi Two Donee Statute and the Common Law Rule Against Perpetuities*, 30 MISS. L.J. 221 (1959).

[149]See Carter v. Berry, 140 So. 2d 843 (Miss. 1962), a recent case citing the article, which applies the common law Rule in a situation where there was no succession of donees.

[150]Custy & Brand, *supra* note 148, at 236.

ambulatory until his death.[4] The Mississippi court recognized this distinction at an early date, stating:

> By a trust some present interest passes, or may pass before the death of the donor. It may be a revocable or a conditional trust, and the death of the donor, as any other future event, may be fixed as the period at which the enjoyment of the trust estate by the beneficiaries shall begin or end. By a will no present disposition is made of any interest. The will takes effect as a dispositive instrument only from the death of the testator. It passes nothing in presenti to be then enjoyed. It is a present declaration of a future disposition.[5]

The fundamental advantage of a will seems to be that it enables the testator to determine who shall succeed to his property after his death without requiring him to part with it during life, whereas the fundamental disadvantage is that the testator's freedom of disposition is often restricted.[6] However, it is well settled that one has a much greater freedom of alienation inter vivos than he has freedom of testamentary disposition.[7] Because the revocable inter vivos trust effects a present transfer of property rights, it should not be subject to restrictions placed on testamentary dispositions. However, because the trust is revocable, the settlor does not run the risk of being unable to recall the property once transferred. It would seem that a revocable trust approximates the basic advantage of a will while completely avoiding its fundamental disadvantage. The following discussion will attempt to determine to what extent such statement is correct.

III. Validity When Used to Avoid Probate

A. Validity Under the Statute of Wills Generally

When a revocable inter vivos trust is used as a substitute for a will, the question arises whether such a device is testamentary in nature and thus invalid if not executed in compliance with the requirements of the Statute of Wills.[8] It is now well established that intent of the settlor to avoid probate by use of the revocable trust device does not

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[4]See, *e.g.*, National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143 (1896); Pickney v. City Bank Farmer's Trust Co., 249 App. Div. 375, 292 N.Y. Supp. 835 (1937); 1 Page, Wills §§ 6.2, 6.13 (rev. Bowe & Parker 1960) (cases therein collected); 1 Scott, Trusts § 57.1 (2d ed. 1956) [hereinafter referred to as Scott].

[5]Hiserodt v. Hamlett, 20 So. 143, 146 (Miss. 1896) (concurring opinion).

[6]See, *e.g.*, Miss. Code Ann. §§ 668, 671 (1956).

[7]*Cf.* Robertson v. Robertson, 147 Ala. 311, 40 So. 105 (1905); Jones v. Somerville, 78 Miss. 269, 28 So. 940 (1900); Cameron v. Cameron, 18 Miss. 394 (1848). See generally Annot., 64 A.L.R. 466 (1929); Annot., 49 A.L.R.2d 521 (1956).

[8]Bensing, *Inter Vivos Trust and the Election Rights of a Surviving Spouse*, 42 Ky. L.J. 616, 618 (1953-54).

render an otherwise valid revocable inter vivos trust testamentary.[9] The determinative factor seems to be the amount of control retained by the settlor over the trust property. In other words, the question is, how close did the settlor come to retaining the property when he "gave it away"?[10] If no beneficiary acquires an interest prior to the settlor's death, the trust is obviously testamentary,[11] but if a beneficiary does receive an interest prior to the settlor's death, it is immaterial that enjoyment in possession is postponed until the settlor's death.[12] If the trust is irrevocable it is immaterial what other power of control is retained by the settlor.[13] It is also well established that a trust is not rendered testamentary by the reservation of income for life, the power to alter, modify, or amend, and the power to revoke in whole or in part.[14] It is significant in this regard that, similar to a power of appointment, "a right of revocation is not a property right and has none of the attributes of property. Hence if the founder of a trust reserves such power and dies without exercising it the trust remains complete."[15] The settlor should expressly reserve the right to revoke "in whole or in part," for it has been held that reservation of the right to revoke in whole does not include the right to revoke in part.[16] The fact that the settlor appoints himself trustee rather than appointing another should not render the revocable trust testamentary,[17] but if the settlor also reserves the right to administer the property in his complete discretion, the trust is testamentary.[18]

When the settlor reserves the right to control the trustee in the

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[9]*E.g.*, National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); *cf.* Jones v. Somerville, 78 Miss. 269, 28 So. 940 (1900); Cameron v. Cameron, 18 Miss. 394 (1848). See generally 1 SCOTT § 57.1; King, *A Reappraisal of the Revocable Trust*, 19 ROCKY MT. L. REV. (1946); Newhall, *Validity of Revocable Trusts*, 79 TRUST & ESTATES 482 (1944); Comment, 27 MISS. L.J. 57 (1956).

[10]See generally 1 SCOTT § 57.2; Bensing, *supra* note 8; Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960); Comment, 27 MISS. L.J. 57 (1956).

[11]1 SCOTT § 56.

[12]*Id.* § 56.5.

[13]Reinecke v. Northern Trust Co., 278 U.S. 339 (1929); Cammeron v. Cammeron, 18 Miss. (10 S. & M.) 394 (1848).

[14]*E.g.*, Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959); Denner Nat'l Bank v. Van Brecht, 137 Colo. 88, 322 P.2d 667 (1958); National Shawmut Bank v. Joy, 315 Mass. 457, 53 N.E.2d 113 (1944); Hiserodt v. Hamlett, 74 Miss. 37, 20 So. 143 (1896); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956); 1 SCOTT § 57; Bensing, *supra* note 8; Comment, 27 MISS. L.J. 57 (1956); Annot., 32 A.L.R.2d 1270 (1953).

[15]Annot., 32 A.L.R.2d 1270, 1280-81 (1953).

[16]National Newark & Essex Banking Co. v. Rosahl, 97 N.J. Eq. 74, 128 Atl. 586 (Ch. 1925).

[17]*E.g.*, Ladner v. Ladner, 128 Miss. 75, 90 So. 593 (1922); Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956).

[18]See 1 SCOTT § 57.6.

conflict of authority in this unsettled area of the law, the determinative factor often being consideration of policy rather than legal theory.

1. *Majority View*

The majority of the cases subscribe to the view that the test of validity of the revocable trust device as against the surviving spouse's elective share is the degree of control retained by the settlor. Professor Bensing states: "[I]n a majority of jurisdictions, the test of the validity of an inter vivos transfer when attacked by the surviving spouse is whether the transferor in good faith divested himself of the ownership of the property transferred."[32] The courts adhering to this general rule do not agree as to the quantity of control which the settlor may retain over the trust res. Some courts hold that the same standard is applied to the surviving spouse's rights as is applied to determine whether the trust is testamentary. If the settlor does not retain such control as to render the trust testamentary in nature, then it is a valid inter vivos transfer in all respects and the surviving spouse has no recourse against the property so transferred. Thus the surviving spouse is not given a superior position, but is treated as any other party who would benefit by the trust being declared testamentary.[33] The Massachusetts court has clearly stated the rule:

> In this commonwealth a husband has absolute right to dispose of any or all of his personal property in his lifetime, without the knowledge or consent of his wife, with the result that it will not form part of his estate for her to share under the statute of distributions. . . , under his will, or by virtue of a waiver of his will. That is true even though his sole purpose was to disinherit her.[34]

This is also the position taken by the Restatement[35] and this rule has been followed when the trust used is of the *Totten* class.[36] However, the desirability of such seems questionable since the settlor can retain absolute discretionary control over the *Totten* trust corpus without making the trust testamentary. The Restatement takes the position that the surviving spouse can reach the deposit of a *Totten* trust.[37]

Other courts hold that even though the trust is not generally

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[32]Bensing, *supra* note 8, at 617.

[33]*E.g.*, United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N.W.2d 458 (1942); Beirne v. Continental Equitable Title & Trust Co., 307 Pa. 570, 161 Atl. 721 (1932). *Contra*, PA. STAT. ANN. tit. 20, § 301.11 (Supp. 1958). See generally Casner, *supra* note 10 at 124; Goldman, *supra* note 27.

[34]Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299, 306 (1945).

[35]RESTATEMENT (SECOND), TRUSTS § 57, comment *c* (1957).

[36]*E.g.*, *In re* Freistadt's Will, 279 App. Div. 603, 107 N.Y.S.2d 466 (1951).

[37]RESTATEMENT (SECOND), TRUSTS § 57, comment *e* (1957).

testamentary, it is ineffective to cut off the rights of the surviving spouse if the settlor retains such a degree of control as to make the trust "illusory."[38] These courts will allow a trust to stand as nontestamentary while still allowing the surviving spouse to take her distributive share from the trust corpus. Thus the surviving spouse is placed in a preferred position. The leading case in this matter is *Newman v. Dore,* where the settlor reserved income for life, power to revoke at pleasure, and limited the powers granted to the trustee by making them "subject to the settlor's control during his life."[39] The court in the *Newman* case expressly refused to hold which of the above powers would have to be deleted in order to make it enforcible as against the surviving spouse. The cases following the *Newman* rule also refuse to set forth a rule of thumb and consider each case on its own factual merits. However, the courts have generally held a trust "illusory" as against the surviving spouse when the settlor reserved not only a life interest, power to revoke, and power to alter or amend, but also reserved some power to control the trustee in the administration of the trust. The power to control the trustee in the administration of the trust appears to be the determinative factor.[40] The courts following the *Newman* rule often allow the trust to stand as to all but the surviving spouse, and allow the surviving spouse to set aside the trust to the extent of her statutory share.[41]

The *Totten* trust must be considered separately. New York has had considerable difficulty in applying the *Newman* doctrine to *Totten* trusts. That state first held that the surviving spouse could attack the trust deposit,[42] but these cases were later overruled.[43] The present situation in that jurisdiction is that ordinary trusts are subject to the *Newman* rule while *Totten* trusts, which are certainly "illusory" because of the complete discretionary control retained by the settlor, are not subject to the *Newman* doctrine and may be used to defeat the rights of the surviving spouse.[44]

Another variation of the majority rule is found in the Maryland decisions. The rule there has been concisely stated:

> The Maryland courts seem to decide the cases on equitable

[38] *E.g.,* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937). See generally 1 SCOTT § 57.5; Annot., 49 A.L.R.2d 521 (1956).

[39] 275 N.Y. 371, 9 N.E.2d 966 (1937).

[40] *E.g.,* President & Directors of Manhattan Co. v. Janowitz, 172 Misc. 290, 14 N.Y.S.2d 375 (Sup. Ct. 1939); Bensing, *supra* note 8.

[41] See, *e.g.,* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944). *Contra,* Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

[42] *E.g.,* Krause v. Krause, 285 N.Y. 27, 32 N.E.2d 779 (1941).

[43] *E.g., In re* Freistadt's Will, 279 App. Div. 603, 107 N.Y.S.2d 466 (1951); Bergmann v. Bergmann, 5 Misc. 2d 190, 159 N.Y.S.2d 844 (Sup. Ct. 1957).

[44] *Ibid.*

bankrupt could have exercised for his own benefit.[61] The statute seems not to apply to powers exercisable by will,[62] but does apply to a general power of appointment exercisable by deed and a power to revoke.[63]

E. Validity of a "Pour-Over" from Settlor's Will into His Revocable Trust

The settlor of a revocable inter vivos trust may wish to augment the trust corpus by a testamentary gift, i.e., he may desire to "pour-over" property by will into his previously created revocable trust.[64] There are two theories upon which a "pour-over" from a will into a revocable trust may possibly be sustained. The first is the doctrine of incorporation by reference; the second is the doctrine of independent significance.

A majority of states recognize the doctrine of incorporation by reference,[65] and in most of them the elements of the doctrine are as follows:

> The will itself must refer to [the nontestamentary document] to be incorporated as being in existence at the time of the execution of the will, in such a way as reasonably to identify such paper in the will, and in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof. Such document must in fact be in existence at the time of the execution of the will. Such document must correspond to the description thereof in the will and must be shown to be the instrument therein referred to. These requisites must co-exist in order to incorporate a document into the will. The absence of any one of them will prevent such incorporation.[66]

For purposes of this discussion, it is significant that the doctrine of incorporation by reference requires that the document to be incorporated be in existence at the time the will is executed and be referred to in the will as such. The doctrine of independent significance, however, is a more liberal rule than that of incorporation by reference, allowing testamentary disposition to be controlled by extrinsic facts, not only writings, which were not in existence at the time the will was executed. The doctrine has been explained as follows:

> Even though a disposition cannot be fully ascertained from the terms of the will or an incorporation therein, the gift may

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[61] Bankruptcy Act § 70(a), 66 Stat. 429 (1952), 11 U.S.C. § 110(a)(3) (1959).

[62] See, *e.g.*, Forbes v. Snow, 245 Mass. 85, 140 N.E. 418 (1923).

[63] See 4 COLLIER, BANKRUPTCY 992 (14th ed. 1942).

[64] See generally CASNER, ESTATE PLANNING 115 (3d ed. 1951); 2 PAGE, §§ 19.27, 19.34; 1 SCOTT § 54.3; Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960); Comment, 27 MISS. L.J. 220 (1956); Annot., 21 A.L.R.2d 220 (1952).

[65] 2 PAGE § 19.18.

[66] *Id.* at 89.

> be valid if susceptible to identification by facts which have a significance independent of their effect upon the testamentary disposition. Then, the designation of the beneficiary or of the amount of the bequest may be governed by a part or future act of the testator, the beneficiary, or a third person, whether or not such act is embodied in or accompanied by a writing. But, if the reference is to an act which has meaning only in terms of the disposition under the will, the doctrine offers no aid.[67]

It is submitted that a revocable inter vivos trust has significance independent of a will which may "pour-over" property into the trust, provided the trust is executed a reasonable time before settlor's death and effects a present transfer of the beneficial interest.[68] Where, however, only nominal corpus has been placed in the revocable trust, the "pour-over" should not be sustained on the theory of independent significance; only the doctrine of incorporation by reference should be applicable, for such trust obviously does not have significance apart from the will which pours into it substantial corpus.[69] Generally speaking, the courts tend to overlook the doctrine of independent significance and determine the validity of the "pour-over" under the doctrine of incorporation by reference.[70]

Where the "pour-over" is into a revocable trust that has never been revoked or amended, the authorities, with one exception, hold the transaction valid.[71] The theory most often used is that of incorporation by reference.[72] Where the revocable trust has been amended prior to the execution of the will, but not thereafter, the vast majority of cases allow the "pour-over."[73] The doctrine of incorporation by reference is still applicable for the trust was in existence at the execution of the will and has not been altered subsequently. The same result is obtained where the trust has been amended after the will but before a subsequent codicil.[74] But where the trust has been amended

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[67]Comment, 27 MISS. L.J. 220, 222 (1956); quoting Samuels, *Incorporation by Reference in New York Wills*, 19 N.Y.U.L. REV. 270, 273-74 (1942).

[68]See 1 SCOTT § 54.3.

[69]See *e.g.*, *In re* Edwards' Will Trusts, [1948] Ch. 440, *modifying* [1947] 2 All E.R. 521. *But cf.* State *ex rel.* Citizens National Bank v. Superior Court, 236 Ind. 135, 138 N.E.2d 900 (1956).

[70]*Cf.* Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944); see Annot., 21 A.L.R.2d 220 (1952).

[71]*E.g.*, Montgomery v. Blankenship, 217 Ark. 375, 230 S.W.2d 51 (1950). *Contra*, *In re* Jones [1942] Ch. 328.

[72]*E.g.*, Montgomery v. Blankenship, 217 Ark. 375, 230 S.W.2d 51 (1950); see PAGE § 19.27.

[73]*E.g.*, *In re* Bremer's Will, 156 Misc. 160, 281 N.Y. Supp. 264 (Surr. Ct. 1935), *aff'd on rehearing*, 157 Misc. 221, 283 N.Y. Supp. 159 (Surr. Ct. 1935).

[74]First-Central Trust Co. v. Claflin, 49 Ohio L. Abs. 29, 73 N.E.2d 388 (C.P. 1947).

> the grantor *or a nonadverse party, or both.* (Emphasis added.) [85]

Under this section, income from the revocable trust property is taxed to the settlor just as if he had never made the transfer to the trustee. However, there are at least two ways by which the settlor may avoid being taxed on the trust income. First, he may avoid it by providing that his power of revocation can be exercised only in conjunction with an adverse party;[86] however, the disadvantage of restricting the settlor's power of revocation would seem to outweigh the advantage of income tax avoidance. The second possible method of avoiding taxation on the revocable trust income is more practical. Section 676 (b), the *Clifford* trust statute, provides:

> [The income of a revocable trust shall not be taxed to the settlor thereof if by exercising the power of revocation he] can only affect the beneficial enjoyment of the income for a period commencing after the expiration [of ten years from the date of the transfer in trust]. But the grantor may be treated as the owner after the expiration of such period unless the power is relinquished.[87]

Therefore, if settlor suspends his power of revocation for a period of more than ten years from the date of creation of the trust, the trust income for such period will not be taxed to him. However, the income will become taxable the date the power of revocation becomes exercisable unless he relinquishes the power. Being limited by the definition of the revocable inter vivos trust as above set forth, further discussion of the income tax consequences of the use of an adverse party and the *Clifford* trust is beyond the scope of this article.

As in the case of probate items, the corpus of a revocable trust acquires a new basis on the death of the settlor. This basis is the fair market value of the property at the date of the settlor's death.[88]

B. Federal Estate Taxes

The value of the settlor's gross estate, for federal estate tax purposes, includes the value of the property over which he had a power of revocation at the date of his death.[89]

The 1954 Code states:

> [The value of the gross estate includes the value of all property] to the extent of any interest therein of which the decedent has

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[85] INT. REV. CODE OF 1954, § 676 (a).

[86] INT. REV. CODE OF 1954, §§ 676 (b), 673 (a).

[87] INT. REV. CODE OF 1954, § 676 (b).

[88] INT. REV. CODE OF 1954, § 1014.

[89] See INT. REV. CODE OF 1954, § 2038. See also Howard v. United States, 125 F.2d 986 (5th Cir. 1942).

> at any time made a transfer . . . by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person . . . to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.[90]

This section includes the situation where the settlor makes himself trustee. However, the same tax savings that can be accomplished by a testamentary trust can be realized by use of a revocable trust, e.g., the marital deduction, because in both instances the trust corpus is includible in the settlor's gross estate.[91] Professor Casner points out[92] that unlike the 1939 Code,[93] the 1954 Code allows an estate tax deduction for debts, expenses of administration, etc., even though the deduction is in excess of the value of the property subject to claims (which under local law may not include the value of a revocable trust corpus) provided the excess is paid prior to the date set for the filing of the estate tax return.[94]

C. Federal Gift Taxes

The Regulations state that "a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself."[95] No taxable gift is made when a revocable trust is executed, therefore the settlor is still deemed the owner for federal gift tax purposes. No gift is made as long as the settlor retains the power to revoke, either alone or in conjunction with a party who does not have a substantial adverse interest in principal or income.[96] The settlor may, of course, renounce his retained powers and thus make a completed gift from that date,[97] which if made more than three years before his death will not be deemed to be in contemplation of death.[98] Distributions of income from the revocable trust constitute completed gifts as made.[99]

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[90] INT. REV. CODE OF 1954, § 2038 (a) (1).

[91] See 1 PAGE § 8.25.

[92] CASNER, *op. cit. supra* note 64.

[93] See Int. Rev. Code of 1939, § 812 (b).

[94] See INT. REV. CODE OF 1954, § 2053.

[95] Treas. Reg. § 25.2511-2 (c) (1958). See also Rev. Rul. 58-395; 1958 INT. REV. BUL. No. 32, at 14.

[96] Treas. Reg. § 25.2511-2 (e) (1958).

[97] Treas. Reg. § 25.2511-2 (f) (1958); see Estate of Stanford v. Commissioner, 308 U.S. 39 (1939).

[98] INT. REV. CODE OF 1954, § 2035 (b).

[99] Treas. Reg. § 25.2511-2 (f) (1958); see Commissioner v. Warner, 127 F.2d 913 (9th Cir. 1942).

D. State Taxes

State taxes, although certainly not of as much significance as federal taxes, merit consideration. The scope of this article will not permit examination of each state's law, but taxability of the revocable inter vivos trust under Mississippi law may be explained. Mississippi levies income and estate taxes but does not impose a gift tax.

The Mississippi Code provides that the gross estate for income tax purposes includes income derived from any source whatever.[100] Another section states that the income tax laws shall apply to income from "property held in trust."[101] Careful search of the Code, Regulations, and cases has disclosed no authority making the settlor of a revocable trust liable for taxation of the trust income merely because he retains a power of revocation. There is no parallel in the Mississippi Code to section 676 of the Internal Revenue Code. Moreover, the Mississippi Supreme Court in *State v. Johnson*, held as follows: "It is a well-established rule that a taxing statute must be strictly construed against the taxing power and in favor of the taxpayer, and all doubts as to whether or not a tax has been imposed must be resolved in favor of the taxpayer."[102] It is submitted that the income from a revocable inter vivos trust is not taxable to the settlor merely because he retains a power of revocation, as it is under the Internal Revenue Code.

Section 9262-04 (d) of the Mississippi Code[103] is the provision most similar to section 2038 of the Internal Revenue Code. Section 9262-04 (d) provides, *inter alia*, that the value of the decedent's gross estate shall include the value of property "to the extent to any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . ." Any transfer made within two years of death and in the nature of a "final disposition or distribution" is deemed prima facie to be in contemplation of death. Therefore, and again relying on the doctrine of *State v. Johnson*, it is submitted that the retention by the settlor of a power of revocation, without more, will not make the trust property includible in his gross estate for Mississippi estate tax purposes. However, if the settlor retained income for life, so that the transfer was "intended to take effect in possession or enjoyment at or after his death" then the property might be included.

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[100]MISS. CODE ANN. § 9220-08 (a) (Supp. 1960).
[101]MISS. CODE ANN. § 9220-14 (1952).
[102]238 Miss. 211, 222, 118 So. 2d 308, 313 (1960).
[103]MISS. CODE ANN. (Supp. 1960).

V. Advantages Offered to the Estate Plan

The basic utility of the revocable inter vivos trust in estate planning is the flexibility gained by avoidance of probate. Specific advantages of the device and reasons for avoiding probate will not be separately considered.

A. Freedom from Restrictions on Testamentary Dispositions

The validity of the revocable trust device when used to avoid probate has been discussed. It was pointed out that, varying from jurisdiction to jurisdiction, a revocable trust with retained power of control over the trustee is not considered testamentary, that the device may be used to avoid the statutory, forced share rights of the surviving spouse, that the revocable trust may be used to circumvent the local statute of mortmain, that the revocable trust may be used to insulate against creditors, and that a "pour-over" to a revocable trust is upheld even though the trust has been amended after the will has been executed. It is submitted that restrictions on testamentary disposition are disruptive to even the most carefully drawn estate plan and in many instances circumvention of said restrictions is justified. To the above discussion one more fact must be added. Even if the local law of one's jurisdiction will not allow use of the revocable trust to avoid an undesirable testamentary restriction, one may so execute his trust as to come under the laws of a more desirable jurisdiction. Professor Casner states that "the law of the most favorable state is available to a citizen of any other state if he establishes the revocable inter vivos trust with the intention that its laws control the trust, and if the trustee and the trust property are located there."[104] In *National Shawmut Bank v. Cummings*,[105] a Vermont settlor availed himself of the liberal Massachusetts law allowing a revocable trust to stand against the surviving spouse if the trust is not found to be generally testamentary. The Vermont rule was that an intent to defeat the surviving spouse's rights rendered the transfer invalid as to her. In that case the trust property and trustee were located in Massachusetts and the trust instrument provided that the Massachusetts law should control. Since some states allow great latitude in the use of the revocable trust to accomplish that which cannot be done by will and since the settlor is allowed to choose his jurisdiction, the ability of the estate planner to achieve the ends desired by his client is greatly increased.

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[104] Casner, Estate Planning 142 (3d ed. 1961); *accord*, Hanson v. Denckla, 357 U.S. 235 (1958); National Shawmut Bank v. Cummings, 325 Mass. 457, 91 N.E.2d 337 (1950). See generally 1 Nossaman, Trust Administration & Taxation § 10.01 (2d ed. 1961); Black & Ward, *Development and Implementation of an Estate Plan*, 9 U. Fla. L. Rev. 388 (1956).

[105] 325 Mass. 457, 91 N.E.2d 337 (1950).

B. Defense to Anticipated Attack that Donor Is Incompetent or Was Unduly Influenced

The fact that the settlor executed an instrument some time before death thereby effecting a present transfer of property rights should reduce the likelihood that the transaction could be successfully attacked after his death on the grounds of incompetency or undue influence. It is submitted that a revocable inter vivos trust, transferring a beneficial interest to commence in enjoyment in possession before the settlor's death, would be difficult to set aside on such grounds after his death. If the attack were made during the settlor's life, he would be available to defend. The fact that the beneficiary received the enjoyment of the property during the settlor's life would seem to be evidence of the settlor's capacity and freedom of will much more so than his execution of a will to be made public and take effect only upon his death.[106]

C. Savings in Probate Expenses

Attorney's and executor's fees for probating an estate are usually a percentage of the value of the probate estate by statute or rule of court.[107] Therefore, since the value of property in the settlor's revocable trust is not included in his probate estate, a savings in such fees should result by use of the revocable trust. However, use of the revocable trust does result in federal estate and income taxes, the value thereof being includible in the settlor's gross estate for federal estate tax purposes. The executor will be allowed a fee for services rendered in paying such taxes. Also there is the offsetting cost of creating and administering the trust which can be reduced by use of a "family" trustee. Moreover, the charges of the trustee for administering the trust are fully deductible for income tax purposes.[108] If real estate or tangible personalty is located in a state other than that of the owner's domicile, the problem of ancillary probate is raised. Such proceedings are expensive, inconvenient, and complicated but may be avoided by placing the property in a revocable inter vivos trust.[109]

D. Availability of Support Funds for Settlor's Beneficiaries Immediately upon His Decease

Generally, probate assets are unavailable for payment to beneficiaries immediately after testator's death. An executor or administrator

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[106]See Stanford, *"Twenty Questions"—Comparison of Revocable & Testamentary Trust*, 93 TRUSTS & ESTATES 608 (1934).

[107]*Ibid.*

[108]INT. REV. CODE OF 1954, § 214.

[109]See Hefferman & Williams, *Revocable Trusts in Estate Planning*, 44 CORNELL L.Q. 524 (1959).

must be appointed, and except for allowances which take priority over the demands of creditors, the executor is subject to personal liability if he pays out probate assets before satisfying qualifying creditors. Distribution of assets may be further delayed by a will contest. Moreover, the period immediately after decedent's death may be the very time that his dependents need funds available. By use of a revocable trust the settlor may avoid this problem and provide funds for immediate distribution to his family.[110] By use of the conflict of laws rule he may execute his trust in a jurisdiction where his creditors may not subject the trust property to their demands, provided the transfer in trust is not a fraudulent conveyance.

E. Preservation of Secrecy as to the Disposition of Property and the Amount Involved

Testamentary disposition of property and amounts involved are disclosed in the will, and when filed for probate are matters of public record. One may understandably desire to prevent the details of his estate plan from being a matter of common knowledge. Although the terms of a revocable trust must be disclosed in connection with filing the federal estate tax return, such disclosure is not made a matter of public record. The period immediately after decedent's death is often the time when it is most desirable to maintain secrecy as to the exact value of the decedent's assets and his disposition of them.[111]

F. Reduction of Disruptive Effect of Decedent's Death on His Business

If decedent's business becomes part of his probate estate upon his death, its continued operation will be subjected to the "restrictive" supervision of the probate court. Moreover, between decedent's death and final settlement of his estate, the management of his business will shift from him to the manager during probate, and then upon settlement of the estate to the beneficiary. Such will certainly have a disruptive effect upon decedent's business. The manager during probate will be required to file periodic reports with the probate court which will be open to the decedent's competitors. However, by transferring his business to a revocable trust and appointing a capable trustee while retaining the allowable amount of control over the trustee, the settlor may avoid the disruptive effect of his death on the business. This would allow the settlor to train his successor in the business and prevent his competitors from gaining information concerning the details

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[110]See Casner, *Estate Planning—Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960).

[111]See Hefferman & Williams, *supra* note 109, at 524.

of the operation after his death. By retaining the power to modify as well as to revoke the trust, the settlor can change the terms of the trust as conditions necessitating them arise.[112]

VI. Conclusion

From the foregoing discussion it should be evident that even though there is generally no federal tax advantage to the revocable inter vivos trust, the device does approximate to a considerable degree the advantages of a testamentary disposition without many of its disadvantages. The revocable trust is especially suited for one not financially able to part irrevocably with portions of his property during life. At the very least, careful consideration should be given to the utility of the revocable trust as an element in the estate plan.

William Timothy Jones

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[112] *Ibid.*

RECENT DECISIONS

Constitutional Law—The State and Blood Transfusions for Infants—Religious Freedom

Parents of the infant refused hospital authorities permission to administer blood, although the attending physicians advised that the child might die without a transfusion. Under authority of the statutes,[1] a guardian of the infant was appointed by the court for the purpose of consenting to blood transfusions. The parents, members of Jehovah's Witnesses, based their refusal upon their religious beliefs that the life is in the blood and therefore the blood may not be eaten.[2] They contended that their rights to religious freedom were abridged. They denied the jurisdiction of the court to take from them custody of their child. Held: Affirmed. Neither the statute nor the decision of the trial court in declaring the parents guilty of neglect of their infant son was violative of religious freedom as guaranteed by the state and federal constitutions or the due process clause of the federal constitution. *State v. Perricone*, 181 A.2d 751 (N.Y. 1962).

It is fundamental with the American people to respect freedom of religion and the right of parents to direct the upbringing of their children,[3] for the child is not the mere creature of the state.[4] But neither rights of religion nor rights of parenthood are beyond limitation,[5] and they must be considered in the light of the general welfare.[6] The constitutional freedom of religion is not absolute, but relative.[7] This has been enunciated in a decision of the United States Supreme Court upholding the conviction of a Mormon for bigamy against the defense that it violated religious freedom as guaranteed in the first amendment.[8] The Court stated that while laws cannot interfere with religious beliefs and opinions, they may with practices. Said the Court, "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?"[9] Thus, it has generally been held that the natural right of the father to the custody of his child cannot be treated as an absolute right but rather as a trust reposed in the father by the state as parens patriae for the welfare of the infant,[10] and the state may, by controlling the person of the infant, remove it even from the custody of its own parents.[11] In the exercise of authority, one court ordered an operation to correct a leg deformity of a minor child despite the opposition of the

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[1] N.J. Stat. Ann. 9:2-10 (1960).

[2] *Leviticus* 17:11-12.

[3] See, *e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, 773 (1952).

[4] *E.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[5] *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[6] *E.g.*, Sadlock v. Board of Educ., 137 N.J.L. 85, 58 A.2d 218 (1948).

[7] *E.g.*, McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957).

[8] Reynolds v. United States, 98 U.S. 145 (1878).

[9] *Id.* at 166.

[10] *E.g.*, Lippincott v. Lippincott, 97 N.J. Eq. 517, 519-20, 128 A. 254 (Ct. Err. & App. 1925).

[11] See Pomeroy, A Treatise on Equity Jurisprudence § 1307 (1941).

child's father,[12] while another court ordered the removal of the eye of a two-year-old child, as recommended by medical experts, when the parents refused to permit the operation.[13]

The court in the noted case held that there was a compelling necessity for the protection of the child's welfare and that the action taken by the lower court was in conformity with the statute that children are wards of the state and that the state may intervene to safeguard them from neglect or injury.[14] Such children may be brought before the court,[15] and an order given for their custody.[16] In a similar case, a New Jersey court awarded custody of a child to the County Welfare Department for purposes of having a blood transfusion administered, when the parents refused to give their consent on religious grounds.[17] Religious objections were likewise overridden in the courts of Illinois[18] and Missouri.[19]

In instances where the proposed treatment is dangerous to life, such as the case involving the question of the desirability of amputating an abnormal arm,[20] or where the physical condition is not emergent and there is no serious threat to health,[21] the opinion of the parents will not be lightly disregarded. Such is not the situation in the noted case, for the life of the child was at stake, and the proposed treatment, a blood transfusion, constituted no danger in itself. The instant case, in line with other decisions, serves notice that society is not required to stand aside until the infant is dead for want of medical care, but may take direct steps to preserve the life of the child, regardless of the religious beliefs of the parents.

Sylvester John Hemleben

WORKMEN'S COMPENSATION—FAIR INTERPRETATION OF STATUTE MEANS LIBERAL INTERPRETATION

Claimants brought an action under the Mississippi Workmen's Compensation Act for the death of their father, who died from a heart attack which had occurred on employers' premises, but apparently after normal working hours. The deceased, employed on a salary basis, was a shop foreman and did not have specified working hours. The attorney-referee held that the claimant did not meet the burden of proof in showing a causal connection between the decedent's work activities and his death. The Workmen's Compensation Commission upheld the referee's decision, but the circuit court reversed and remanded. HELD: Affirmed. The 1960 amendment[1] which calls for a "fair" interpretation

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[12]*In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Child. Ct. 1941).

[13]*In re* Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933).

[14]N.J. STAT. ANN. 2 A: 4-2 (1952).

[15]N.J. STAT. ANN. 9: 2-9 (1960).

[16]*Id.* 9: 2-10 (1960).

[17]Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961).

[18]People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952).

[19]Morrison v. State, 252 S.W.2d 97 (Mo. Ct. App. 1952).

[20]*In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

[21]*E.g., In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (Ct. App. 1955).

[1]MISS. CODE ANN. § 6998.01 (Supp. 1960).

does not affect the established doctrine of "liberal" construction designed to effect the remedial purpose of the Act. *L. B. Priester & Sons v. Dependents of Bynum*, 141 So. 2d 246, *suggestion of error overruled*, 142 So. 2d 30 (Miss. 1962).

It is universally held that the remedial intention of the legislatures must be augmented by the interpretation given by the courts, thereby requiring a "liberal" interpretation in favor of the claimant.[2] Courts differ widely in defining a "liberal" interpretation.[3] For example, Wisconsin allows compensation for all cases which *reasonably* can be brought within its laws,[4] while New Jersey will allow recovery in all cases which *possibly* can come under its Workmen's Compensation Act.[5] Missouri has a statute which specifically calls for a "liberal" interpretation of its act,[6] but will not allow compensation for injuries received from horseplay.[7] In contrast, Mississippi may allow recovery for such injuries.[8] Many states use such terminology as "fair," "broad," or "reasonable" interchangeably with "liberal" to construe their Workmen's Compensation Law.[9] Most courts have been more liberal in allowing compensation benefits with each passing decade, beginning with a very strict construction of the compensation laws in the early days of social legislation.[10]

Considered as having one of the most liberal and best written acts in the nation,[11] and being one of the last states to enact a Workmen's Compensation Act, Mississippi drew heavily from the experiences of other states, including the liberal trend allowing compensation for any reasonable claim. Mississippi depended considerably upon the Federal Longshoreman's and Harbor Worker's Act, and on the compensation laws of Michigan, New York, Ohio, Wisconsin, Florida, and Arkansas.[12] In one of the earlier decisions, it was decided that the Workmen's Compensation Act should receive a liberal construction in favor of the claimant, but on suggestion of error the court decided that while the construction of the act must be liberal, it must be reasonable as well.[13] This construction was being followed in 1960, when the legislature amended the statute under consideration.[14] As introduced, this bill stated that the Workmen's Compensation Act would ". . . not be

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[2]99 C.J.S. *Workmen's Compensation* § 20 (c) (1958).

[3]Dodd, Administration of Workmen's Compensation 62-69 (1935).

[4]See, *e.g.*, Fels v. Industrial Comm'n, 269 Wis. 294, 69 N.W. 2d 255 (1955).

[5]See, *e.g.*, Gross v. Pellicane, 65 N.J. Super. 386, 167 A.2d 838 (Monmouth County Ct. 1961).

[6]Ann. Mo. Stat. § 287.800 (1952).

[7]See Gregory v. Lewis Sales Co., 384 S.W.2d 734 (Mo. App. 1959).

[8]See, *e.g.*, Mutual Hardware & Implement Ins. Co. v. Pittman, 214 Miss. 823, 59 So. 2d 547 (1952).

[9]See, *e.g.*, 99 C.J.S. *Workmen's Compensation* § 20 (a) (1958).

[10]See Dodd, *op. cit. supra* note 3, at 37.

[11]Satterfield, *An Introduction to Workmen's Compensation*, 20 Miss. L.J. 27 (1948).

[12]Ethridge, *The New Mississippi Workmen's Compensation Act*, 2 NAACA L.J. 87 (1948).

[13]Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So. 2d 381, *rev'd on suggestion of error*, 214 Miss. 626, 59 So. 2d 294 (1952), 24 Miss. L.J. 263 (1953).

[14]Miss. Code Ann. § 6998.01 (Supp. 1960).

liberally construed in favor of the claimant or workman, but shall be fairly construed according to the facts. . . ."[15] This amendment was rejected, and in its place an amendment was passed which stated, ". . . this act shall be fairly construed according to the law and evidence."[16] There was some doubt as to whether this new amendment would change the court's earlier interpretation, but it was felt by some that the courts would follow the humanitarian objectives manifested in the Act of 1948.[17] The question was raised in one case,[18] but not mentioned in a later case.[19] The instant case clearly answers the question. A "fair" construction is a "liberal" construction.

Statutes which are remedial in nature, such as the Workmen's Compensation Act, are generally construed liberally to further their purpose.[20] If the legislature intends to alter the existing principles of law by a new statute or amendment, it must unequivocally declare its intention,[21] otherwise there is a presumption that the legislature has expressed everything intended.[22] The court must assume also that the law remains unchanged when the legislature has had ample opportunity to remove any ambiguity created.[23] However, it would have been possible for the court to have found that the legislature intended to effect some change in the existing law by amending the statute.[24] Where the wording of a statute is ambiguous or uncertain, the court may consider the occasion giving rise to the enactment of the act or any other evidence which could explain the motives of the legislature.[25] The objectives of the Workmen's Compensation Act with its humanitarian and sociological implications would preclude any but a liberal interpretation.[26] The rejection by the Mississippi legislature of an amendment which could have changed these principles would seem to show an intention to uphold the objectives for which the law was created.

Joseph D. Gordon, Jr.

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[15]MISS. H.R. 69 (1960) (subsequently modified and enacted).

[16]MISS. CODE ANN. § 6998.01 (Supp. 1960).

[17]DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 21 (Supp. 1960). See also 32 MISS. L.J. 333 (1961).

[18]Highway Patrol v. Neal's Dependents, 239 Miss. 505, 125 So. 2d 544 (1960).

[19]Ross v. Ross, 240 Miss. 84, 126 So. 2d 512 (1961), 32 MISS. L. J. 333.

[20]See, *e.g.*, Huffstettler v. Lion Oil Co., 208 F.2d 549, 553 (8th Cir. 1953).

[21]*E.g.*, Duncan v. Rudulph, 245 Ala. 175, 16 So. 2d 313 (1944).

[22]*E.g.*, Eyster v. Centennial Bd. of Fin., 94 U.S. 500 (1877).

[23]*E.g.*, Succession of Sciaccaluga, 177 La. 795, 149 So. 458 (1933).

[24]See, *e.g.*, Magis v. Lyman-Richey Sand & Gravel Corp., 189 F.2d 130 (8th Cir. 1951).

[25]See, *e.g.*, Thornhill v. Ford, 213 Miss. 49, 56 So. 2d 23 (1952).

[26]See, *e.g.*, Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 52 So. 2d 634 (1951).

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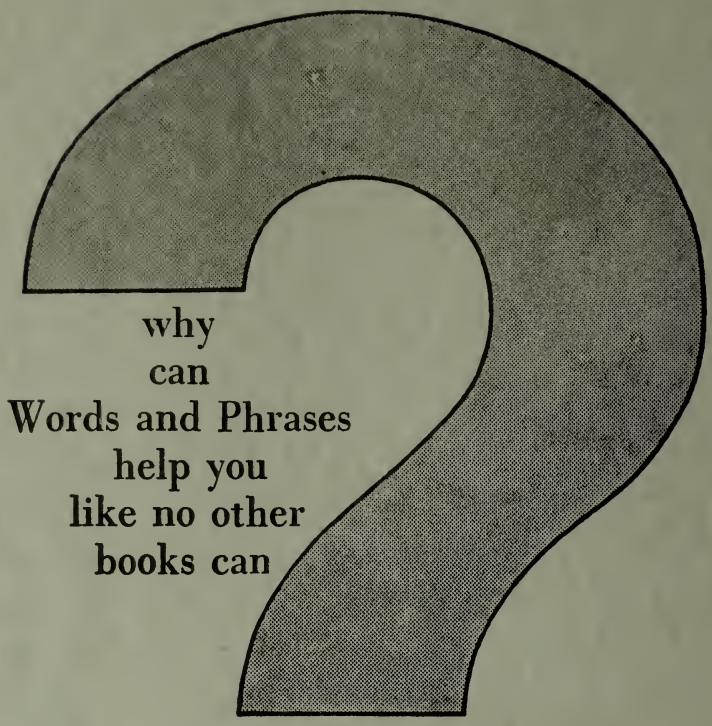

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